In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, AT THE relation of Kansas City Southern Railway Company, Plaintiff in Error, *v.* INTERSTATE COMMERCE COMMISSION. } No. 413.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance this case for argument on an early day of the present term convenient to the court.

This is a suit by the relator, Kansas City Southern Railway Company, for a writ of mandamus to compel the Interstate Commerce Commission to receive certain evidence which it has refused to receive in a proceeding now pending before it, entitled *In the Matter of the Valuation of the Property of the Kansas City Southern Railway Company et al.*

By the act of March 1, 1913 (37 Stat. 701), commonly known as the railroad-valuation act, the Interstate Commerce Commission is required, among

other things, to "investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to" the act to regulate commerce. Paragraph second of said act reads as follows:

> Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier and ascertained as of the time of dedication to public use and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

The Kansas City Southern Company applied for and received permission from the commission to introduce in the before-mentioned proceeding certain evidence which it was claimed would establish the present cost of condemnation and damages or of purchase of the lands included in the rights of way, yards, and terminals of the railroad dedicated to the public use.

At the hearing before an examiner of the commission the relator introduced such evidence to the extent that it was prepared to do so. Thereafter relator requested permission to introduce additional evidence of the same character, and this request was denied by the commission for the reasons stated in its decision in the *Texas Midland Case* (1 I. C. C. Val. Rep. 1), whereupon relator brought this suit for a mandamus.

The commission states that it has not undertaken to take evidence relative to ascertaining the "present cost of condemnation and damages or of purchase in excess of original cost or present value" of railroad properties, for the reason that, as pointed out by this court in the *Minnesota Rate Case* (230 U. S. 352), there is no lawful or reasonable basis upon which to rest such an estimate, except that it has permitted relator and other carriers to introduce evidence showing the impossibility of complying with this requirement of the valuation act.

The question involved in this case is one arising in a large number of similar cases now pending before the commission. It is therefore a case of general public importance, and it is believed that the question involved should be settled as promptly as possible.

Opposing counsel concur.

ALEX. C. KING,
Solicitor General.

OCTOBER, 1919.

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JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM—1919.

No. 413.

THE UNITED STATES OF AMERICA on the relation of Kansas City Southern Railway Company,

Plaintiff-in-Error,

vs.

INTERSTATE COMMERCE COMMISSION.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF-IN-ERROR.

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SUBJECT INDEX.

Statement 1-7

Assignment of Errors 8-9

Argument.

Point I. Where, as in this case, a plain duty is imposed upon the Interstate Commerce Commission and it declines to proceed with its performance, mandamus lies to require it to act..... 10-19

Point II. The action of the Interstate Commerce Commission in deliberately disregarding the mandate of Congress which required the Commission, in express terms, to investigate and report "separately the original and present cost of condemnation and damages or of purchase in excess of the original cost or present value" of all lands, rights of way and terminals owned or used for the purpose or purposes of a common carrier, offends every canon of statutory construction 19-30

PAGE

Point III. The Commission having found the average acreage market value of adjacent lands and having applied it to the plaintiff's right of way, and the plaintiff having accepted this finding, it is an easy and simple process to find the present cost of condemnation and damages or of purchase and the Commission should be required to do so. 31-41

Point IV. Unless the Commission is required to ascertain the cost of condemnation and damages or of purchase of its carrier lands, the plaintiff will suffer great and irreparable injury, and its property will be confiscated to the extent of millions of dollars. 41-51

Point V. There are no practical difficulties in the way of ascertaining the present cost of condemnation and damages or of purchase of plaintiff's lands... 51-60

Point VI. That certain of plaintiff's lands were acquired by donation presents no difficulty in the way of ascertaining their present cost of condemnation and damage or of purchase..... 60-62

PAGE

Point VII. The rulings in the Minnesota Rate Cases and related cases, do not relieve the Commission of its plain duty under the Valuation Act to ascertain and report the cost of condemnation or of purchase of the plaintiff's lands. 62-68

Appendix A—Valuation Act of March 1, 1913 69-76

Appendix B—An Analysis of the Minnesota Rate Cases and related cases in so far as they may be claimed to affect the issues in the present case.. 77-106

(a) The Valuation Act contemplates and requires estimates to be made and assumptions to be indulged. 78-80

(b) Matters which were not before the Supreme Court for decision and which, therefore, were not decided. 80-82

(c) The real issue in the Minnesota Rate Cases was between "Railway Value" and "Market Value" as the basis of computation, and the court decided in favor of market value. 82-83

(d) Statement of the facts disclosed in the Minnesota Rate Cases 83-85

PAGE

(e) Complainant's method of arriving at land values. 86-90

I. A summary of what was actually decided in the Minnesota Rate Cases 91

II. The Court fully recognizes that the condemnation cost of the right of way as ordinarily understood, is a proper element to be considered in determining the value of railway lands. 92-98

III. It follows that it was estimates, based solely on hypothetical "Railway Value," that received the condemnation of the Court. 98-104

IV. The Denver Water Works Case does not support the Commission's interpretation of the Minnesota Rate Cases 104-106

CASES AND AUTHORITIES CITED.

	PAGE
Barrett v. United States (169 U. S. 228)	23
Bauman v. Ross (167 U. S. 548, 574)	37
Blair v. Chicago (201 U. S. 400)	23
Brunswick Term. Co. v. Baltimore Natl. Bk. (192 U. S. 386)	23
Connaway, Ex parte (178 U. S. 421)	10
Cope v. Cope (137 U. S. 682)	21
Dennis v. Maxfield (10 Allen 138)	41
Denver v. Water Works (246 U. S. 178) ...	63
Dewey v. United States (178 U. S. 510) ...	21
Early v. Doe (16 How. 616)	23
Hamilton County v. Garrett (62 Tex. 602)..	37
Harding, Ex parte (219 U. S. 363)	19
Harriman, The (9 Wall. 172)	27
High Bridge Lumber Co. v. United States (69 Fed Rep. 320)	37
Hoard, Ex parte (105 U. S. 578)	19
Interstate Commerce Commission v. United States, ex rel. Humboldt (224 U. S. 474)	10
Kansas City So. Ry. v. Second St. Co. (256 Mo. 279)	37
Kansas Postal Co. v. Leavenworth Bridge Co. (89 Kan. 418)	37
Ketchum Coal Co. v. District Court (159 Pac. 737)	10
Klauber v. San Diego Car Co. (95 Cal. 353)	27
Knight v. United States Land Assn. (142 U. S. 161)	23
Lane v. Hogland (244 U. S. 174)	10, 13
Lincoln v. Commonwealth (164 Mass. 368)..	37
Louisville & Nashville Co. v. Mottley (219 U. S. 467)	23

PAGE

Market Co. v. Hoffman (101 U. S. 115) 21
Metropolitan Water Co., Ex parte (220 U. S. 539) 10
Mineral Separation v. Butte & Superior M. Co. (250 U. S. 351) 45
Minnesota Rate Cases (230 U. S. 352) 6, 19, 29, 34, 63
Palmer v. Van Santvoord (153 N. Y. 612) .. 22
Park Square Auto Station, Ex parte (244 U. S. 412) 19
Petri v. Commercial Bank (142 U. S. 161) ... 23
Platt v. Union Pacific Co. (99 U. S. 59) 23
Reid v. Alaska Packing Assn. (43 Oregon 439) 28
Rice v. Minn. & N. W. R. R. Co. (1 Black 379) 23
Roberts v. United States (176 U. S. 221) 13
Roe, Ex parte (230 U. S. 70) 19
St. Louis & I. M. R. R. Co. v. Maxfield Co. (94 Ark. 135) 37
Schell v. Plumb (55 N. Y. 592) 41
Simons, In re (247 U. S. 231) 10
Simpson v. London & M. W. Ry. Co. (L. R. 1 Q. B. 274) 41
Slater, Ex parte (246 U. S. 128) 19
Smyth v. Ames (169 U. S. 546) 30
South Buffalo R. R. Co. v. Kirkover (176 N. Y. 301) 37
Texas Midland Case (1 Valuation Report, 52) 6, 20, 32, 33, 42, 43, 57-59
United States, Ex parte (242 U. S. 227).... 10
United States v. Fisher (109 U. S. 143) 23
United States v. Gooding (12 Wheat. 460) .. 23
United States v. Grizzard (219 U. S. 180) 36
United States v. Lexington Mill Co. (232 U. S. 399) 22

PAGE

United States v. Oregon &c. R. R. Co. (164 U. S. 540) 23
United States v. United Verde Copper Co. 196 U. S. 207) 23
United States v. Welch (217 U. S. 333)... 37
United States ex rel. Louisville Cement Co. v. Interstate Commerce Comm. (246 U. S. 637) 10
Wakeman v. Wheeler & Wilson Co. (101 N. Y. 205) 41
Wichita Falls Co. v. Munsell (38 Okla. 256) 37

STATUTES.

Valuation Act of March 1, 1913. .....15, 69-76

Text Books and Reports.

Century Dictionary 27
Hare on Contracts 27
Interstate Com. Comm., Record of Proceedings. 44, 52-55
Lewis' Sutherland's Statutory Construction 21
Report 62nd Congress, Third Session 17
Valuation Report of I. C. C. 6

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 413.

THE UNITED STATES OF AMERICA, at the relation of THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Plaintiff-in-Error,

vs.

THE INTERSTATE COMMERCE COMMISSION.

BRIEF OF PLAINTIFF-IN-ERROR.

Statement.

The question involved in this record does not grow out of disputed facts, but is wholly one of law, and may be stated briefly as follows:

Can the Interstate Commerce Commission be required by mandamus to investigate and report the "present cost of condemnation and damages or of purchase" of the "lands right of way and terminals owned and used for the purposes of a common carrier," as required by the Valuation Act of March 1st, 1913, and to admit competent testimony offered

by the carrier to establish these facts, where in proceedings instituted under that Act the Commission refused to do so?

The plaintiff in error (herein referred to as the plaintiff) filed its petition for mandamus against the Commission in the Supreme Court of the District of Columbia on December 5th, 1918 (Rec., page 1), to require the Commission to ascertain the "present cost of condemnation and damages or of purchase" of its carrier lands, and to admit competent evidence in support of that issue. The plaintiff demurred (Rec., page 55), to the Commission's answer (Rec., pages 25, 54), to the amended petition (Rec., page 30).

Judgment was rendered by the Court of first instance in favor of the defendant, without a written opinion, on March 6th, 1919 (Rec., page 56). An appeal was prosecuted to the Court of Appeals of the District of Columbia, where the cause was argued on May 6th, 1919 (Rec., page 59), before two judges of that court, the third judge being absent. On June 2nd, 1919, the court being equally divided, the judgment of the lower court was affirmed without a written opinion.

The case comes here on writ of error. The solution of the question involved depends on these facts:

The Act of Congress of March 1st, 1913, commonly called the Valuation Act (herein set forth as Appendix A), provides by Section 19a, that the Interstate Commerce Commission shall investigate and report the final value of all the property owned or used by every common carrier subject to the provisions of the "Act to Regulate Commerce." It is also required to ascertain and report in detail, as to every piece of property owned or used by

each common carrier many other things, including (a) the original cost to date, (b) the cost of reproduction new, (c) the cost of reproduction less depreciation, and (d) other values and elements of value, if any.

With respect to the Commission's special duty concerning rights of way and other lands, the provisions of Section 19a, of the Act are as follows:

> "SECOND.—Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, *and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.*"

After collecting the necessary data, the Commission is required to find and publish a tentative valuation of all the property owned or used by every common carrier, and thereupon the carrier is allowed thirty days within which to file its protest with the Commission, which it may support by the introduction of testimony. Provision is made therefor in the following terms:

> "If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relevant and material thereto which may be presented in support of any such protest so filed as aforesaid."

It is further provided that after hearing the protest, the Commission, if of the opinion that its tentative valuation should be modified, shall make such changes as may be necessary, and shall issue an order making the corrected tentative valuation final as of the date thereof. All final valuations by the Commission shall be *prima facie* evidence of the value of the property of each carrier in all proceedings under the "Act to Regulate Commerce," in all judicial proceedings for the enforcement of the Act to Regulate Commerce, and in all judicial proceedings to enjoin, set aside, annul or suspend in whole or in part any order of the Commission.

The Commission began its investigation of the value of the plaintiff's property in 1914, and in November, 1916, published and served upon the plaintiff its tentative valuation.

Neither in the tentative valuation nor in the investigation which preceded it, did the Commission make any investigation or report whatsoever as to the "present cost of condemnation and damages or of purchase" of the plaintiff's lands (Amended Petition, Rec., page 31, Answer, Rec. page 26). In other words, the Commission has not found nor has it undertaken to find the cost of reproduction of the plaintiff's right of way and other lands, as required by the statute, or to comply with its explicit command. For reasons presently to be stated the Commission formally announced its refusal to conform with that portion of the Act above italicized, imposing the duty specified. The plaintiff duly filed with the Commission its protest complaining of this omission.

After admitting testimony offered by the plaintiff to establish the present cost of condemna-

tion and damages or of purchase of its properties in Jackson County, Missouri (which embraces Kansas City only), the Commission refused to admit the testimony offered by the plaintiff to show the cost of reproduction of its lands outside of that county, extending over the entire length of its system operated in Missouri, Kansas, Oklahoma, Arkansas, Louisiana and Texas, and comprising over 700 miles of right of way, besides terminals and other land used for the purposes of a common carrier (See Paragraphs, Fifth, Sixth, Seventh and Eighth of Amended Petition, Rec., pages 33, 34, and Answer, Rec., page26). The Commission's ruling is expressed in its resolution of November 15th, 1918, quoted in the Petition (Rec., page 24).

> "Voted that for the reasons stated in the report in the Texas Midland case, the motion of counsel for the Kansas City Southern Railway Company in the Kansas City Southern valuation case to take further testimony as to the present cost of condemnation and damages or acquisition of carrier lands of the petitioner be overruled, Chairman Daniels voting in the negative (Seventh Paragraph, Amended Petition, Rec., page 34 and Answer, Rec., page 26).

As set forth in this resolution, the sole reason assigned by the Commission for its refusal to find the cost of reproduction of the plaintiff's lands and to admit the plaintiff's testimony tending to prove that fact, is to be found in its decision theretofore rendered in the Valuation Case of the Texas Midland Railway Company. The Commission there says in substance (*I. C. C., Val. Rep.* 1, at pages

52, 62, 168, 172), that reproduction cost of land cannot be ascertained, and hence it is useless to admit testimony upon that issue. It bases this conclusion upon what we regard as an erroneous interpretation of the opinion in the *Minnesota Rate Cases*, 230 U. S., 352. It is to be noted that the Commission does not undertake to pass upon the weight or competency of the testimony offered by the plaintiff and admitted by it in relation to the cost of reproduction of the plaintiff's lands in Jackson County, Missouri, nor does it undertake to pass upon the competency or relevancy of any testimony which the plaintiff is prepared to offer in support of its contention touching the cost of reproducing its lands extending over 700 miles south of Jackson County, Missouri.

The Commission has found what it terms the "present value" of the plaintiff's lands. It defines what it means by this expression in the Texas Midland Case (1 Val. Rep., 53), as follows:

> "Present value is arrived at by ascertaining the number of acres of land owned or used by the carrier for its purposes as a common carrier, and multiplying this acreage by a market value determined from the present market value of similar and adjoining lands."

We strenuously insist that this so-called present value is not the present value of plaintiff's lands, but is nothing more than the average acreage value of adjoining lands. That is quite another thing, for it excludes the cost of condemnation and damages or of purchase in excess of the original cost constituting as they do essential elements of the

present value of the land of the carrier used for the purposes of such carrier.

The Commission accordingly found the so-called present value of the plaintiff's lands, as an entirety, to be approximately $5,000,000. It is charged in the Amended Petition, and not denied in the Answer, that the cost of acquisition of these same lands by purchase or condemnation as of valuation date, June 30, 1914, would exceed the so-called present value by the sum of $5,000,000, thus making the aggregate cost of reproduction approximately $10,000,000 (Rec. page 35).

Our contention is that the Valuation Act requires the Commission to ascertain and report these reproduction costs, to the end that the amount thereof may be before the Commission for its consideration when it later proceeds to place a final value upon all of the properties of the plaintiff.

It is also alleged in the Amended Petition, by way of illustration of the consequences resulting from the Commission's refusal to perform its duty under the Valuation Act, and it is not denied, that certain lands were acquired by the plaintiff for right-of-way shortly before the valuation date, through condemnation proceedings, at an actual cost of $180,000, and that the Commission has reported the so-called present value of these lands at $60,000 (Rec., pages 34,35). Our contention is that the larger sum represents the "cost of condemnation and damages or of purchase" of these lands and should be so reported by the Commission and made a part of plaintiff's land schedule.

Assignment of Errors.

I.

The Court of Appeals erred in entering judgment affirming the judgment of the Supreme Court of the District of Columbia, and in effect sustaining its order dismissing with costs the petition of plaintiff for a writ of mandamus to the Interstate Commerce Commission to require it to investigate, report, find and state in detail the present cost of condemnation and damages or of purchase in excess of original cost or present value of all lands, rights-of-way and terminals owned or used for the purposes of a common carrier by plaintiff, as required by the Act of Congress of March 1, 1913, imposing said duty upon said Commission.

II.

The Court of Appeals erred in sustaining the Supreme Court of the District of Columbia in overruling the demurrer of the plaintiff to the answer of the Interstate Commerce Commission to the petition of plaintiff praying said court to issue its writ of mandamus to said Commission to require it to comply with the provisions of said Act of Congress March 1, 1913, commonly known as the Valuation Act.

III.

The Court of Appeals erred in construing said Act of Congress of March 1, 1913, known as the Valuation Act, by failing to find that said Act im-

posed upon the Interstate Commerce Commission the ministerial duty to investigate, report, find and state in detail the present cost of condemnation and damages or of purchase in excess of original cost or present value of all lands, rights of way and terminals owned or used for the purposes of a common carrier by plaintiff.

IV.

The Court of Appeals erred in construing said Act of March 1, 1913, known as the Valuation Act, by failing to find that said Act imposes upon the Interstate Commerce Commission the ministerial duty to hear and consider any evidence or matter relevant or material to a determination of said present cost of condemnation or purchase, which may be offered by plaintiff for the purpose of establishing such present cost of condemnation or purchase.

V.

The Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia and directing it to issue its writ of mandamus as prayed in the petition (Rec. pages 56, 57, 61, 62).

Brief.

I.

Where, as in this case, a plain duty is imposed upon the Interstate Commerce Commission and it declines to proceed with its performance, mandamus lies to require it to act.

It was not contended by the Commission in either of the courts below that mandamus is not a proper remedy for the relief sought by the Amended Petition.

The authorities establish not only the appropriateness, but also the necessity of that remedy.

Interstate Commerce Commission vs. *United States ex rel Humboldt Steamship Company*, 224 U. S., 474.
Lane vs. *Hogland*, 224 U. S., 174.
In re Simons, 247 U. S., 231.
United States, ex rel Louisville Cement Company vs. *Interstate Commerce Commission*, 246 U. S., 637.
Ex parte Metropolitan Water Company, 220 U. S., 539.
Ex parte United States, 242 U. S., 227.
Ex parte Connaway, 178 U. S., 421.
Ketchum Coal Company vs. *District Court*, 159 Pac., 737, 26 Cyc., 190.

In Interstate Commerce Commission vs. *Humboldt Steamship Co., supra*, the case was brought here on a writ of error to the Court of Appeals of the District of Columbia. The steamship company

had instituted an action in the Supreme Court of the District of Columbia praying for a mandamus against the Commission to require it to take jurisdiction and proceed as required by the Interstate Commerce Act with respect to the filing with the Commission of schedules showing the rates and charges for transportation of passengers and property of various common carriers between points in Alaska and points in the Dominion of Canada and other places and other matters. The Supreme Court of the District of Columbia, although holding that the Commission had ample authority to assume jurisdiction over common carriers in Alaska, nevertheless decided that it had no power to require the Commission to act contrary to its own judgment in a matter wherein, after investigation, it had reached a conclusion, honestly and fairly, which might be contrary to the conclusion which the Court would reach. The Court of Appeals took a different view of the power of the courts to compel action and reversed the judgment of the Supreme Court, and remanded the cause with directions to issue a peremptory writ of mandamus as prayed for. This Court affirmed such action. In the course of his opinion Mr. Justice McKenna said:

> "The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion. It is true there

may be a jurisdiction to determine the possession of jurisdiction. *Ex parte Harding,* 219 U. S., 263. But the full doctrine of that case cannot be extended to administrative officers. The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasi judicial duties, but its functions are defined and, in the main, explicity directed by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its nonaction be reviewed? The answer of the Commission is, by 'a reversal by the tribunal of appeal.' And such a tribunal, it is intimated, is the United States Commerce Court.

But the proposition is plainly without merit, even although it be conceded, for the sake of argument, that the Commerce Court is by law vested with the exclusive power to review any and every act of the Commission taken in the exertion of the authority conferred upon it by statute; that is, to exclusively review, not only affirmative orders of the Commission granting relief, but also the action of that body in refusing to award relief on the ground that an applicant was not entitled to relief. * * *

> In the case at bar the Commission refused to proceed at all, though the law required it to do so; and to do so as required—that is, to take jurisdiction, not in what manner to exercise it—is the effect of the decree of the Court of Appeals, the order of the Court being that a peremptory writ of mandamus be issued directing the Commission 'to take jurisdiction of said cause and proceed therein as by law required.' In other words, to proceed to the merits of the controversy, at which point the Commission stopped because it was 'constrained to hold,' as it said, 'upon authority of the decision recently announced in, *In the Matter of Jurisdiction Over Rail and Water Carriers Operating in Alaska,* 19 I. C. C. Rep., 81, that the Commission is without jurisdiction to make the order sought by complainant,' the steamship company."

Lane vs. *Hoglund, supra,* was also brought to this Court on a writ of error to the Court of Appeals of the District of Columbia. A writ of mandamus was refused by the Court of first instance, but was directed to be granted by the Court of Appeals. The construction of a statute of the United States was involved and the duty of the Secretary of the Interior thereunder was drawn in question. Sustaining the right to award the writ, Mr. Justice Van Devanter in his opinion quoted what was said in *Roberts* vs. *United States,* 176 U. S., 221:

> "Unless the writ of mandamus is to become practically valueless, and is to be refused even

where a public office is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the Court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the Court would on that account be powerless to give relief. Such a limitation of the powers of the Court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter

how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

Here mandamus is the only remedy. From the refusal of the Commission to receive relevant testimony and to decline to perform its statutory obligation, there is no appeal; nor is there any right of appeal from the failure of the Commission to find the reproduction cost of the plaintiff's lands. The law provides no method for review of the action of the Commissioner in this regard.

It is true that the Valuation Act contains the following provision:

"If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the Court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the Court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for such time as the Court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said Court within the time fixed by the Court. If the Commission shall alter,

modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order."

It is apparent from this clause that the Commission's determination of the law as well as the findings of fact are final and beyond the power of any court to alter, amend or modify. The sole function conferred on a court in the distant and remote eventuality that the final value as determined by the Commissions is sought to be used on the trial of an action involving such final value as fixed is that of hearing testimony different from that originally heard by the Commission or additional thereto and substantially affecting its value. But even in that event, the Court does not itself reverse the action of the Commission or render judgment or declare the law or define how value shall be determined nor is it otherwise permitted to interfere with the exclusive function of the Commission to fix and determine final value. The new evidence goes to the Commission without any instruction whatsoever from the court. The Commission merely hears the new evidence and again exercises its own judgment in determining the value, weight and consideration to be given to it. In other words, valuation begins with the Commission and ends with it. Its own views both as to law and the fact are a finality.

That this is the true construction of the paragraph in question not only appears from its plain language, but was so understood by the Senate Committee on Interstate Commerce as shown by the report recommending the passage of the Valuation Act (Report 1290, 62nd Congress, 3rd Session). In recommending the addition of this paragraph by amendment, to the House bill, it said:

> "Up to 1906 the Commission had sustained 32 reversals in the Supreme Court. In 26 of those cases the record discloses that the orders of the Commission were reversed, because testimony was offered upon the trial before the Court which was not offered when the case was presented to the Commission.
>
> The purpose of this amendment is to give the Commission the benefit of any testimony which may be offered as to the valuation, which was not presented to the Commission on its hearing of the proceeding. If the Commission finds the new testimony material and important, it is afforded opportunity to modify its order in the proceeding. Such modification of the order may lead to withdrawal of the appeal or to confirmation of the order by the Court. In any event, it is fair to the Commission and to the public, imposes no hardship upon the parties, and may work a great saving of time and expense incident to reversal and retrial."

It may be contended by the Commission, however, that our construction of the provision of the Act in question is not the correct one. Let us assume, as seems to be done by respondent in its an-

swer (Rec., page 27), that the Act does not deprive the Court in the case contemplated, of the power to review the valuation finally fixed by the Commission. The right of review so granted still lacks much of being such an adequate remedy as bars relief by mandamus. The remedy suggested is neither equally direct, convenient, beneficial nor effectual as mandamus. The statute, so construed, affords no method by which a carrier, conceiving itself aggrieved by the valuation placed upon its property, may, of its own initiative, secure a judicial review thereof. It can neither appeal from the decision of the Commission nor prosecute a writ of error thereto, nor can it of its own motion initiate a direct proceeding for the review of an order fixing a final valuation.

It will not do to say that the Act, so construed, affords a remedy as soon as occasion therefor arises, because the carrier might suffer incalculable injury from an unduly low valuation of its property years before any case such as is contemplated by the Act may arise in the courts. The plaintiff would be forced to abide the time, however remote when in some judicial proceeding, the valuation made by the Commission is sought to be used against the carrier, although, in the meantime, on stock exchanges, in its financial transactions, in procedings before administrative bodies and commissions, as well as in both national and state legislation, such valuation may be daily urged to its injury. Adequacy cannot be predicated of a remedy which cannot be invoked at the will of the injured party.

The fact that there is no other remedy available to the plaintiff justifies its right to seek relief by mandamus, as is shown by the following decisions:

Ex parte Harding, 219 U. S., 363;
Ex parte Hoard, 105 U. S., 578;
Ex parte Park Square Automobile Station, 244 U. S., 412;
Ex parte Roe, 230 U. S., 70;
Ex parte Slater, 246 U. S., 128.

The Commission, whilst not denying that a ministerial duty has been imposed upon it by statute which it has refused to perform, pleads the impossibility of complying with the terms of the statute as an excuse for non-performance. The basis for this contention is the interpretation that it has given to the decision of this Court in the *Minnesota Rate Cases,* 230 U. S., 352 (Answer, Rec. page 26).

II.

The action of the Interstate Commerce Commission in deliberately disregarding the mandate of Congress which required the Commission, in express terms, to investigate and report "separately the original and present cost of condemnation and damages or of purchase in excess of the original cost or present value" of all lands, rights of way and terminals owned or used for the purposes of a common carrier, offends the fundamental canons of statutory construction.

The Commission has frankly avowed its determination not to receive or consider the testimony

offered by the plaintiff in error, as to the present cost of condemnation and damages or acquisition of carrier lands. It plants its decision on the reasons stated in its report in the *Texas Midland Railroad Company Case.* Those reasons are, in short, that the requirements of the statute are to be ignored because impossible of performance.

It is not claimed by the Commission that the act is unconstitutional. It is not pretended that its language is ambiguous, meaningless, or unintelligible. The Commission has not undertaken to interpret, but to nullify, congressional action. The command of the legislative branch of the Government, addressed to a ministerial body, requiring definite action, is set aside by the very agency created by Congress and charged by it with the duty of making the investigation and report, thus refused to be made. The Commission has, for all practical effect, drawn its pen through the statute designed to define its duties with respect to the valuation of the property of carriers, and has, by its action, declared that it will not do what the Congress of the United States has made it its duty to do.

This presents a situation so startling and extraordinary as to make it necesary, for fear that some underlying principle of law may have been overlooked, to test the accuracy of one's impressions regarding the omnipotence of Congress, which except as controlled by the Constitution, has hitherto been regarded as unquestioned. We know that the Congress is superior in power and authority to the agencies that it creates, and that there is an absolute presumption that it will do no wrong and pass no unjust or ill-considered laws. We also know that what is or is not public policy is ul-

timately to be determined by it, and that when a statute which it has duly enacted declares what the public policy is, as to matters to which the act relates, it must be enforced and cannot be annulled either by the judicial or the executive departments of the Government.

Lewis' Sutherland's Statutory Construction, §85.

We further know that unless a statute violates some express provision of the Constitution it must be held to be valid and must be carried out in accordance with its terms.

Cope vs. *Cope,* 137 U. S., 682, 685.
Dewey vs. *United States,* 178 U. S., 510, 521.

We likewise know that it is an elementary principle, based on the soundest of reasons, that every word and phrase of a statute must be given effect, rather than that part should be expunged and perish by construction.

As was said by Mr. Justice Strong in *Market Co.* vs. *Hoffman,* 101 U. S., 115:

> "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in *Bacon's Abridgement,* §2, it was said that 'a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.' This rule has been repeated innumerable times."

This language was cited with approval and applied in *United States* vs. *Lexington Mill and Elevator Co.,* 232 U. S., 399. The question considered was the interpretation of a provision in the Food and Drugs Act dealing with the subject of the adulteration of food. It provided that, food shall be deemed adulterated "if it contain and added poisonous or other added deleterious ingredient *which may render such article injurious to health.*" On the trial of a libel filed for the condemnation of flour claimed to have been adulterated, the instruction of the Court permitted the statute to be read without the final and qualifying words concerning the effect of the article upon health. Mr. Justice Day said:

> "If Congress had so intended the provision would have stopped with the condemnation of food which contained any added poisonous or other added deleterious ingredient. In other words, the first and familiar consideration is that, if Congress had intended to enact the statute in that form, it would have done so by choice of apt words to express that intent."

In *Palmer* vs. *Van Santvoord,* 153 N. Y., 612, 616, Chief Judge Andrews said:

> "Words are not to be rejected as superfluous when it is practicable to give to each a distinct and consistent meaning. 'The good expositor,' says Lord Coke, 'makes every sentence have its operation to suppress all the mischiefs; he gives effect to every word of the statute; he does not construe it so that anything should be vain and superfluous, nor yet make exposi-

tion against express words, but so expounds it that one part may stand agreeable with the other and all may stand together.' (*Coke's Rep., part VIII, page* 310.)"

Among the many cases in which this doctrine has been applied are:

United States vs. *Gooding,* 12 Wheat., 460;
Early vs. *Doe,* 16 How., 616;
Rice vs. *Minnesota & N. W. R. R. Co.,* 1 Black, 379;
Platt vs. *Union Pacific R. R. Co.,* 99 U. S., 59.
United States vs. *Fisher,* 109 U. S., 143;
Knight vs. *U. S. Land Assn.,* 142 U. S., 161, 177.
Petri vs. *Commercial Bank,* 142 U. S., 649, 650.
United States vs. *Oregon, &c., R. R. Co.,* 164 U. S., 540;
Barrett vs. *United States,* 169 U. S., 228;
Brunswick Terminal Co. vs. *Baltimore Natl. Bk.,* 192 U. S., 386, 396;
United States vs. *United Verde Copper Co.,* 196 U. S., 207, 213;
Blair vs. *Chicago,* 201 U. S., 400, 466, 467;
Louisville & Nashville R. R. Co. vs. *Mottley,* 219 U. S., 467.

To overcome the overwhelming presumption voiced by these authorities that Congress meant just what it said, the Commission has nevertheless declared that the expressed intention of Congress was futile because of supposed impossibility of carrying it into execution. In other words, although it was

regarded as possible to investigate and gather all the other information specified in every part of the five categories enumerated in the act, it was deemed impossible to investigate and report "separately the original and present cost of condemnation and damages or of purchase in excess of the original cost or present value" of the lands, rights of way and terminals owned or used for the purposes of a common carrier.

Whether or not such an investigation would be difficult or expensive or protracted is unimportant. That is likewise true of the other inquiries formulated in the Statute and which have been pursued during the past six years at enormous expense and with painful minuteness. The Congress, which declared it to be necessary to set on foot an investigation to the end that the Commission shall ascertain and report *"in detail as to each piece of property* owned or used by the common carrier for its purpose as a common carrier, *the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation* * * * and other values and elements of value, if any, of the property of such common carrier," and a further investigation and report " in *detail* and separately from improvements" as to "the original cost of all lands, rights of way and terminals owned or used for the purpose of a common carrier * * * as of the time of dedication to public use and the present value of the same," cannot be regarded as shrinking from difficulties or lightly deemed to have contemplated an impossibility, when, in the same connection, it required an investigation and report "as to the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value." Congress must at

least be presumed as a result of such investigation to have seriously considered and determined the feasibility of acquiring what it looked upon as valuable and important information. It did not lay down any method of proof by which this information was to be obtained or deduced. It was contemplated that the Commission would adopt methods by which the several costs and values as to which it was called upon to report were to be ascertained.

Thus, in subdivision "First" of Section 19a of the act, the Commission is required in its report to give "an analysis of the *methods by which these several costs are obtained* and the reasons for their differences, if any," and likewise "an analysis of the *methods of valuation employed* and of the reasons for any differences between any such value and each of the foregoing cost values." In subdivision "Third" the Commission is directed to give "an analysis of *the methods of valuation* employed with respect to property held for purposes other than those of a common carrier."

The Congress certainly deemed it vital,not only for its guidance with respect to future rate legislation, but also for the protection of the public and of the carrier, to learn by the best methods attainable under the circumstances, what the condemnation cost and damages of the lands, rights of way and terminals of the several common carriers had been or would be. It must have throughly appreciated the common understanding that condemnation cost and damages constitute important factors in the valuation of lands used for railroad purposes. The Congress must be deemed to have known, as well as did the Commission, that when it called on the latter to report as to the present cost

of condemnation and damages or of the purchase of railroad property in excess of its original cost or present value, it would not be actually necessary to institute anew condemnation proceedings for lands already owned by the common carriers. The problem was not however of so recondite a character as to defy solution. In view of the magnitude of the labors and comprehensive character of the investigation which Congress commanded the Commission to undertake, it must have regarded the latter, or the experts and other assistants whom it was authorized to employ, to be competent, by the exercise of their reasoning powers and with the aid of such data as might be obtained by patient and industrious research, to make at least an accurate estimate as to what would be the original and present costs of condemnation and damages or of purchase as to which, by the terms of the act, the Commission was to investigate and report. That is precisely what is done by railroad engineers when they estimate in advance of construction what will be the reasonable cost of acquiring the lands necessary for the railroad. They draw on their own knowledge and experience and on that of others.

Whilst we may assume that, if Congress had required such investigation to be made by experts brought from the planet Mars, it would have been impossible to have carried out its intent, it is an entirely different proposition to say, that, by means of mundane experts possessed of ordinary reasoning powers diligently applied to matters of everyday experience, it would be impossible to accomplish what Congress had in mind.

After all, what is the meaning of the phrase "impossibility of performance" when applied to the

terms of a statute or of a contract? The Century Dictionary defines "impossibility" as "the quality of being impossible; incapability of being or being done." "Impossible" is defined: "1. Not possible; non-existent or false by necessity. (a) Beyond the strength or power of the agent. (b) Not possible from the nature of things; contrary to a general principle or law of nature or of thought; that not only is not, and will not exist or happen, under actual circumstances, but would not be under any circumstannces, within certain limits."

In *Klauber* vs. *San Diego Street Car Co.,* 95 Cal., 353, 30 Pac. Rep., 555, 556, the Court, quoted from *Hare on Contracts,* 639, the following passage dealing with the subject of impossibility of performance.

> "To warrant the application of the principle, the impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it; or, as it is sometimes termed, be an *impossibilitas rei,* as distinguished from an *impossibilitas facti.* If the thing could be accomplished by any one with proper means and the requisite skill and knowledge, the promisor was not less answerable because it was impossible to him."

In *The Harriman,* 9 Wall., 172, Mr. Justice Swayne said:

> "The principle deducible from the authorities is, that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be

shown that the thing cannot by any means be effected. Nothing short of this will excuse non-performance."

In *Reid* vs. *Alaska Packing Assn.*, 43 Oregon, 439, 73 Pac. Rep., 337, 339, Mr. Justice Bean said:

"Before one can be excused, however, from the performance of a valid contract, deliberately entered into, because of the impossibility of performance, it must appear that the thing agreed to be done is impossible upon its face, and cannot, by any means, be effected. It is no excuse for the non-performance of a contract that it is impossible for the obligor to fulfill it, if the performance be in its nature possible. 'If the covenant be within the range of possibility,' says Mr. Chief Justice Nelson, 'however absurd or improbable the idea of the execution of it may be, it will be upheld—as where one covenants it shall rain tomorrow, or that the Pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible' (*Beebe* vs. *Johnson*, 19 Wend., 500). * * * Unless an act is inherently impossible within itself, a contract to do it is binding, although the performance may be improbable, or even impossible, to the promisor. To excuse performance, the impossibility must be something more than merely a great inconvenience, hardship, or even impracticability."

What is true of a contract is *a fortiori* true of a statute. Two individuals entering into an agreement are more likely to encounter impossibilities than a legislative body proceeding with deliberation and having at its command the highest intelligence of the land, especially where the subject-matter of the legislation is of such transcendent importance as the greatest single branch of national commerce. What more likely than that every word and phrase shall have concentrated upon it the most critical thought of the most acute intellects of the practical men of affairs and of the theoretical economists of the nation?

In one sense the Congress can make possible what private individuals cannot. It can overrule the decisions of courts, create new rules of evidence, and establish or permit resort to new methods of ascertaining data. Assuming that the *Minnesota Rate Cases*, 230 U. S., 352, hereafter referred to, had in fact laid down the doctrine which the Commission has deduced from that decision, it was within the competence of the Congress to adopt the method of valuation erroneously claimed to have been rejected by that opinion. That is, even though this Court rejected what was there termed "railroad value" as the basis for valuation—Congress, if it chose, could have adopted that basis. It is not unimportant to observe that those cases were argued in this Court in April, 1912, that the nature and importance of the question involved was such that they could not have escaped the attention of the Congress and its committees, and that the Valuation Act which we are now considering was enacted on March 1, 1913. It would be presumptuous to assume that, when Congress passed

this measure, it knew not what it did and sought to attain the impossible.

Nor is it a violent presumption that Congress was not oblivious of what Mr. Justice Harlan said in *Smyth* vs. *Ames*, 169 U. S., 546, with respect to the basis of all calculations as to the reasonableness of rates to be charged by a common carrier, namely, the fair value of the property used for the convenience of the public. Said he:

> "And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be gven such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return on the value of that which it employs for the public convenience."

III.

The Commission having found the average acreage market value of adjacent lands and having applied it to the plaintiff's right of way, and the plaintiff having accepted this finding, it is an easy and simple process to find the present cost of condemnation and damages or of purchase, and the Commission should be required to do so.

It is one of the conceded facts of this case that the Commission has found and extended to plaintiff's right of way the average acreage market value of adjacent lands, and that this finding has been accepted by the plaintiff. The Amended Petition alleges (Rec., page 35):

> "Whatever may have been the difficulties inhering in or incident to the manner of proof offered in said Texas Midland case, the relator says that no such difficulty exists with respect to the ascertainment of said present cost of condemnation and damages or of purchase in the relator's case, and that relator is prepared and has offered to establish definite competent proof respecting each parcel of land owned or used by it, in the following manner, to wit:
>
> Relator accepts, as a basis for such ascertainment, the present market value of its lands as found and determined by the respondent, and assumes that each parcel of land, having

reverted to adjoining owners as it would at common law upon its abandonment, would be re-acquired by the relator by purchase or condemnation during the theoretical reconstruction period. Relator will prove such cost of purchase or condemnation by the testimony of competent expert witnesses familiar with each parcel of property, having knowledge of its value, and thoroughly experienced in the acquisition of private property for public use by purchase or condemnation. Where an entire parcel is thus acquired the cost of its acquisition will be its market value as determined by the respondent as aforesaid, plus certain incidental costs, such as court costs, and the like; where a part only of an entire parcel is taken the cost of acquisition will be the market value of the part taken as determined by the respondent as aforesaid, plus the damage to the residue of the tract, the market value of which would also be as determined by the respondent, plus the incidental costs as aforesaid."

The Commission in its answer (Rec., 26), denies that the evidence thus tendered is competent proof of the present cost of condemnation and damage or of purchase, and so the issue is made.

The method employed by the Commission in ascertaining the average market value or the so-called present value of the plaintiff's lands, is thus described by it in the report of the Texas Midland Case, page 53:

"Present value is arrived at by ascertaining the number of acres of land owned or used by

> the carrier for its purposes as a common carrier, and multiplying this acreage by a market value determined from the present market value of similar and adjoining lands."

There remains, therefore, no controversy concerning the average acreage market vaue of the so-called present value of the plaintiff's lands. The Commission has ascertained the average acreage market value of lands adjoining those of the plaintiff and has multiplied this acreage value by the number of acres owned by the plaintiff. The amount thus ascertained is called by the Commission the "present value" of the plaintiff's lands. We have accepted the Commission's findings of the average acreage market value of adjoining lands, and we have likewise accepted the Commission's computation of the number of acres of plaintiff's lands. We insist, however, that the Commission has not performed its full duty nor complied with the Valuation Act until it has gone further and ascertained the cost of acquiring the plaintiff's lands by purchase or condemnation, as of the valuation date. This the Commission erroneously assumes to be impossible of performance, for the alleged reason that it involves "inadmissible assumptions" and "impossible hypotheses." It says in the Texas Midland Case, page 62:

> "Because of the impossibility of making the self-contradictory assumptions which the theory requires when applied to the carrier's lands, we are unable to report the reproduction cost of such lands or its equivalent, the present cost of acquisition and damages, or of

purchase in excess of present value. The present value of lands as found by us appears in the final valuation, appended hereto."

The Commission reaches this conclusion from its interpretation of the *Minnesota Rate cases,* 230 U. S., 352, which is discussed in Appendix B. It is sufficient for present purposes to point out briefly the reasoning employed by the Commission in reaching the remarkable conclusion that it is impossible to ascertain the cost of the acquisition of plaintiff's lands by purchase or by condemnation.

It is said in substance (Rec., page 28) that the first step, in a land reproduction program, is to assume the non-existence of the railroad, and inasmuch as the adjacent lands, and likewise the carrier's lands, owe their market value, in a large degree, to the presence of the railroad, it is mere guess or speculation to undertake to determine their market value, in the absence of the railroad. Hence, it is said that to ascertain the reproduction cost of lands involves unwarranted and unlawful assumptions, and it is, therefore, concluded to be impossible to ascertain the reproduction cost because the basic factor, namely the market value of adjoining lands, as well as of the lands of the carrier, cannot be ascertained. Nowhere does the Commission say that, given the average acreage market value of adjacent lands or of the lands of the carrier, the cost of their acquisition by purchase or condemnation cannot be ascertained.

But the Commission has found the average acreage market value of adjoining lands and extended this value to the plaintiff's right of way and other

lands. We are not concerned with the process employed by the Commission in reaching this conclusion. Whether it assumed the existence or non-existence of a railroad, is a matter with which it alone is concerned. We are only interested in the fact that this most important finding has been duly made. There is no room for speculation or for indulging in assumptions or hypotheses in this regard. The finding has been made and the plaintiff has accepted it. Both parties are agreed and in complete harmony upon this issue. The average acreage market value of adjoining lands and of the carrier's right of way is an established fact in this case.

This basic factor, therefore, in establishing the cost of acquisition of the carrier's lands by purchase or condemnation, may be taken as the starting point. Our problem has become very much simplified. It presents this form: A designated right of way is to be secured by purchase or condemnation through Congressional subdivisions and city lots and blocks, extending from Kansas City to the Gulf of Mexico, the market value of which has been conclusively agreed upon by the parties. If the right of way is to be condemned, the jury will be instructed that the measure of damages is the agreed market value of the strips of land actually taken, plus the damage to the residue, where less than an entire tract is taken. If the right of way is to be purchased, the agreed market value is the basis of negotiations and the purchase price will approximate the market value of the strip to be purchased plus the damage to the residue of the tract of which it forms a part when less than an entire tract is purchased.

The doctrine applicable to this subject has been laid down in many cases, notably in *United States* vs. *Grizzard*, 219 U. S., 180, 183, 184, where Mr. Justice Lurton said:

> "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from the taking, embracing of course, injury due to the use to which the part appropriated is to be devoted. Thus in *Sharp* vs. *United States*, 191 *U. S.* 341, 353, *damage* resulting to adjacent but distant parcels was denied because there had been no actual appropiation of any part of such separate parcel, but the principle was conceded as to injury, from the character of the use of that taken, to that untaken of the same tract. Upon this distinction the court said: 'Upon the facts which we have detained we think the plaintiff in error was not entitled to recover damages to the land not taken because of the probable use to which the Government would put the land it proposed to take. If the remaining land had been part of the same tract which the Government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the Government, would be a proper subject of award in these condemnation proceedings. But the Government takes the whole of one tract.' To the same effect see Cooley's Constitutional Limitations, pp. 565-566."

See also:

Bauman vs. *Ross*, 167 U. S., 548, 574;
United States vs. *Welch*, 217 U. S., 333;
High Bridge Lumber Co. vs. *United States*, 69 Fed. Rep., 320;
South Buffalo R. R. Co. vs. *Kirkover*, 176 N. Y., 301, 304, 306;
Lincoln vs. *Commonwealth*, 164 *Mass.*, 368, 41 N. E. Rep., 489 (Opinion by Mr. Justice Holmes).

This rule has also been laid down in the various States in and through which the lines of the Kansas City Southern Railway Company run. Among other decisions in those States are:

Hamilton County vs. *Garrett*, 62 *Tex.*, 602;
Kansas Postal Telegraph Cable Co vs. *Leavenworth Bridge Co.*, 89 Kan., 418, 131 Pac. Rep. 143;
Kansas City So. Ry. Co. vs. *Second Street Improvement Co.*, 256 Mo., 279, 166 S. W. Rep. 296;
St. Louis & I. M. R. R. Co. vs. *Theodore Maxfield Co.*, 94 Ark., 135, 26 L. R. A., M. S., 1111;
Wichita Falls Ry. Co. vs. *Munsell*, 38 Okla. 256, 132 Pac. Rep. 906.

There is not the slightest difficulty under this rule to ascertain the cost of condemnation and damages. As a practical proposition such

ascertainment has been an every day occurrence from the beginning of railroad construction. Here the inquiry is much simpler than it is in the ordinary condemnation suit or in the ordinary case of the purchase by a railroad company of right of way. For, in the usual case *two* issues are to be determined,—first, the market value of the land actually taken, and, secondly, the damage to the residue of the tract from which it is carved. We have in the present case the latter inquiry to consider, yet we are gravely told by the Commission that although it has fixed the average acreage market value of adjoining lands, and has applied the same value to the carrier's lands, and we have accepted this finding without reservation, it is nevertheless impossible, starting with these data, to proceed further and determine what it would cost to acquire the right of way by purchase or condemnation. The Commission is in the same position as that occupied by a defendant land owner in a condemnation proceeding, where, after having agreed with the condemning plaintiff upon the market value of the lands taken he should ask the court that the condemnation proceedings be dismissed because of the impossibility of carrying them to completion, because in fixing the amount of damages to that part of his tract untaken, it would be necessary "to indulge in unwarranted and unlawful assumptions."

The Valuation Act is a statutory command addressed to the Commission to ascertain "the pres-

ent cost of condemnation and damages or of purchase" of the carrier's lands. The Commission is required to act as a condemnation jury would act if the lands were being condemned. The issues before it are plain and simple. It is required to find the market value of the tract, where an entire tract is taken, and where less than an entire tract is taken, its market value plus the damage to the residue. It has already determined the market value of the tracts taken and it only remains to ascertain the damage to the residue where less than an entire tract is taken. Let it be assumed that the agreed market value of the lands to be taken is $100 per acre. The only process remaining is to ascertain the damage to the residue where less than an entire tract is taken. Can it reasonably be said that this is impossible of ascertainment?

The fact that the Commission's estimate of the cost of acquisition of plaintiff's right of way by purchase or condemnation is to be made after its railroad has been constructed, and is in operation, presents no difficulty. As everyone knows, it frequently happens that a railroad is constructed and put in operation in advance of the acquisition of right of way, and that the damages to which the owner may be entitled are ascertained afterwards by purchase, by condemnation, or in a suit by the land owner for damages for the appropriation. Again it sometimes happens that at the time a railway company acquires its right of way there is an outstanding deed of trust or mortgage on it, which later on may be foreclosed, either with or without judicial proceedings. The company is thereby divested of its title so that it becomes necessary to

reacquire its right of way by purchase, by condemnation, or through a suit by the land owner for appropriation. In other words, as a matter of practical experience, it frequently becomes necessary for the railway company to acquire right of way after the railroad has been constructed and is in operation. It has never been supposed that such a case presents any serious difficulty. The courts have proven entirely competent to deal adequately with such a situation.

What the courts can thus readily do, is not impossible for a Commission which possesses wider latitude in the choice of methods than is ordinarily exercised by courts.

No "inadmissible assumptions" or "impossible hypotheses" are involved. It is not necessary to obliterate the railroad or to assume its non-existence, or even to stop the operation of its trains, actually or theoretically in order to establish the facts as to which investigation and report is commanded. It is not necessary to speculate upon what would happen if the railroad were removed with a resulting dislocation of industrial and commercial life. With the average acreage market value of adjoining lands agreed upon, all of such speculations, assumptions and hypotheses are behind us. It is only necessary to assume the reversion of the title to the right of way to adjoining landowners, as of valuation date or shortly prior thereto, and its reacquisition by purchase or by process of condemnation. Or it may be assumed that the plaintiff constructed its road with the consent of the landowners in advance of securing title to its right of way, or that its right of way was leased to it by the landowners at the time of construction and that the leases expired at or shortly prior to valuation date.

In either event it would be entirely practicable to determine with reasonable accuracy the estimated cost of re-acquiring by purchase or condemnation.

We contend not only that Congress meant this to be done, but that its purpose can be easily accomplished. But even were it difficult that would not excuse non-performance. Problems much more serious have been overcome.

Wakeman vs. *Wheeler & Wilson Mfg. Co.*, 101 N. Y., 205.
Schell vs. *Plumb*, 55 N. Y., 592.
Dennis vs. *Maxfield*, 10 Allen, 138.
Simpson vs. *London & N. W. Ry. Co.*, L. R. 1 Q. B. Div., 274.

IV.

Unless the Commission is required to ascertain the cost of condemnation and damages or of purchase of its carrier lands, the plaintiff will suffer great and irreparable injury, and its property will be confiscated to the extent of millions of dollars.

Unless the Commission is required in accordance with the command of Congress to ascertain the reproduction cost of the carriers' land, its investigation will be limited to its so-called present value of the bare land constituting its right of way and terminals. When the plaintiff finally submits to the Commission its claim that a figure, representing the final value of all its property, shall be de-

termined by it, as required by the Valuation Act, the only piece of evidence on the subject of land values before the Commission will be this so-called present value. It will not be possible to urge upon the Commission that the value of the plaintiff's lands is at least equal to what it would cost to reproduce them or re-acquire them, as of valuation date, for no evidence to support the claim would be in the record.

The Commission has thus pre-judged our case. It has decided in advance that evidence of the cost of reproducing lands will not be admitted in evidence, and hence cannot be considered in the determination of final value. Other costs of reproduction, such as the cost of reproducing grading, ties, rails, bridges, buildings and equipment will be before the Commission as pieces of evidence bearing upon the subject of final value. But for some unaccountable reason, an exception is to be made with respect of the lands on which the railroad structures are placed and acquired for the sole purpose of accommodating such structures. The value of the lands is to be computed, not at what it would cost to acquire them, but at the average acreage value of adjoining lands.

Everyone knows that to acquire a railroad right of way costs from two to three times the market value of adjacent land. The Commission frankly admits this to be true. In the *Texas Midland Case* (Report, page 170), is found this concession:

> "It canot be denied that frequently the cost to a railroad of acquiring its right of way with respect to parcels which must be purchased, materially exceeds the acreage value of the

> land taken. * * * For the purpose of determining the excess of such cost over acreage value, many studies were made of pieces of construction where the known cost could be compared with the acreage value, and from these investigations were deduced percentages which varied for rural right of way from 150 to 300 per cent., being less in the case of city lands."

Judge Prouty, the Director of Valuation, in the Memorandum filed by him in that case, explicitly admits that the cost of acquiring its lands by a railroad company materially exceeds the market value computed by the acreage of the lands actually taken. He gives his reasons succinctly (page 48):

> "It is generally understood that the cost of acquiring its lands by a railroad materially exceeds the market value by the acre of the lands taken. This is partly due to the peculiar shape of the piece required and partly to other causes. This excess cost to the carrier of obtaining its right of way is a thing of importance in determining the value of its property. The general opinion seems to be that this was the fact for which Congress intended to inquire. What would it cost the carrier to procure its right of way and other operative lands in excess of the market value of such lands by the acre?"

At the hearing of the protest made by several railway companies, including the plaintiff, held by the Commission in Washington on March 24-28, 1917, in the course of the examination of a witness introduced to prove that the cost of the acquisition

of right of way exceeds the market value of the naked land similarly situated in the same vicinity, the Director of Valuation in the course of a colloquy between counsel, said (pages 111, 112 of Record of Proceedings):

"Director Prouty: Now, may I ask once more, Mr. Chaiman, what bearing that has on any issue which we are trying here?

Mr. Bledsoe: Mr. Director, its purpose is to show that the actual cost of the land, when acquired for railway purposes, is in excess of what may be termed the market value of a similar strip of land in the same community.

Director Prouty: You mean by that that it costs more to acquire a railroad right of way than the acerage value of the land embraced in the right of way?

Mr. Bledsoe: Yes, that is part of what I mean, Mr. Prouty.

Director Prouty: *Now that, Mr. Chairman, has never been denied by the Division of Valuation and is not now denied, and it hardly seems worth while to introduce testimony to establish a fact about which there is no controversy.*

Mr. Brantley: Mr. Director, you found a great deal less than the cost of acquring the land.

Director Prouty: I have already stated, Mr. Chairman, that it is our understanding of the Minnesota Rate Case that the value of the adjacent land is to be taken as the value of the right of way. Now, if that is not the holding of that case, then we make no question but

what, as a matter of fact, the value must be found. *In other words, we make no question but what as a matter of fact it costs the railroad company more to acquire its right of way through a piece of land than the acreage value of the land taken, measured by the value of adjacent land.*"

These statements of the Director of Valuation are not physically contained in the present record, but it is well known that perhaps to a greater and more comprehensive an extent than anybody else in this country Judge Prouty has studied the valuation of railway property. Hence his public statements on a subject with which he is so familiar in its technical and practical aspects, like those of any other recognized eminent authority, may be quoted with entire propriety.

Mineral Separation vs. *Butte & Superior Mining Co.*, 250 U. S., 351, 352.

It is not necessary, however, to go beyond the admitted facts in this case to demonstrate the palpable injustice of requiring the plaintiff to submit its case to the Commission with no other evidence of land value than the so-called present value of the segregated right of way. It appears from the Amended Petition (Rec. 34) and the admission in the Answer (Rec. page 26), that the plaintiff during the four years preceding valuation date acquired certain parcels of land for right of way purposes through condemnation proceedings at an actual cost to it of $180,000, and that these same lands have been determined by the Commission to be of the so-called present value of $60,000. The evidence of what these lands actually cost the plaintiff was adduced before the Commission an-

nounced its final ruling to exclude and disregard evidence of that character.

Are lands which actually cost the carrier $180,000, in condemnation proceedings, during the theoretical period of reproduction, to receive a final valuation for the purposes of rate regulation, the issue of securities, the consolidation of the carrier with other carriers and other objects at *one-third* of their actual cost? Or stated differently, when the plaintiff finally presents its case to the Commission upon the question of the final value of its properties for all purposes of public control, is it to be limited, as to these particular lands, to the so-called present value of $60,000, and denied the right even to argue to the Commission that since these lands actually cost the plaintiff $180,000 in condemnation proceedings they should be determined to be fairly worth that sum?

If the foregoing typical illustration is not sufficiently striking, let us take into consideration the allegation of the Amended Petition (Rec. page 35), which is not denied in the Answer, that the refusal of the Commission to ascertain the cost of the acquisition of the plaintiff's right of way by purchase or by condemnation will reduce its land schedule by at least $5,000,000. In other words, this vast sum represents the difference between the Commission's so-called present value of plaintiff's carrier lands and their reproduction cost. The mileage of the plaintiff's railroad is approximately one-third of one per cent. of the entire railroad mileage in the country. The difference, therefore, between so-called present value and the cost of acquisition by purchase or condemnation of the lands of all the railroad of the country, approximates $1,500,000,000.

If the Commission is permitted to persist in its refusal to admit evidence of the cost of the acquisition of lands by purchase or condemnation, the only evidence before it concerning the total value of the plaintiff's lands will be the so-called present value, which, as shown, is admitted to be $5,000,000 less than their reproduction cost. Naturally the Commission cannot place a value upon the plaintiff's lands upon evidence not in the record. Hence plaintiff's lands as an entirety will be valued at $5,000,000 less than the sum required to purchase or condemn them as of the valuation date.

Can it be plausibly contended that a result thus confiscatory in its consequences was ever intended by Congress in its enactment of the Valuation Act? Is not the very converse of such a purpose, evidenced by the clause which the Commission has avowedly expunged from the statute? Not even the most radical extremist has hitherto contended that in placing a valuation on a railroad there are to be elimated from the carrier's investment moneys actually, providently and economically expended in producing the property employed in public service, and that the carrier is not entitled to a reasonable return on such investment.

The Commission has found the so-called present value of all the plaintiff's lands, to aggregate approximately $5,000,000. This is not, nor does it purport to cover the present cost of condemnation or of purchase. It is only the average market value of adjoining lands applied to the area of the plaintiff's right of way. It is common knowledge that these right of way lands could not, as of valuation date, be reproduced for a sum in any way approaching the value as found. As above shown, the Amended Petition contains the undenied al-

legation that the acquisition of these lands by condemnation or by purchase would exceed the so-called present value by $5,000,000. In other words, it would cost $10,000,000 to reproduce these lands but the Commission has arbitrarily refused to yield obedience to the command of Congress that it investigate and report as to this significant fact.

The Commission under the Valuation Act is engaged in investigating and valuing all of the railroads in the country, and the decision of the issue in this case will affect the land schedules and the land values of all of them, We feel justified, therefore, in illustrating our argument by hypothetical cases which are quite likely to represent actual situations.

Let us assume that a railroad line parallel to that of the plaintiff had been built, and its right of way had been acquired during the theoretical construction period, that the quality, location and value of its lands were exactly the same as the plaintiff's and had actually cost $10,000,000. Could anybody justly contend that either should be valued at less than $10,000,000? If the lands of plaintiff are valued at one half their *theoretical* cost of reproduction based on the average market value of adjoining lands, would it not for the same reason, necessarily follow that the lands of the other company should be likewise valued at one-half of their *actual* cost?

Again, let us assume that the plaintiff had acquired its entire right of way from Kansas City to the Gulf, during the three year theoretical reproduction period prior to valuation date, in a prudent and economical manner, at a cost of $10,000,000? Would that not be universally

regarded as the fairest indication of its value? Would it not violate one's sense of right and justice to reduce the valuation to $5,000,000, simply because that represented the value of the actual right of way based solely on the average value of adjoining land? The position of the Commission appears to be that as soon as a right of way has been acquired, e g., by condemnation proceedings where it must be presumed that courts and juries have fairly assessed the value of the land taken and the damage suffered by the land untaken, at a cost of $10,000,000, the value of such right of way at once recedes to $5,000,000 because more than the average market value of the adjoining land has necessarily been paid, by reason of the necessity of compliance with the constitutional obligation to compensate the land owners for damages to lands not actually taken.

Let us once more assume that the plaintiff possessed nothing but its bare right of way extending from Kansas City to the Gulf, and that it was willing to sell this right of way at its fair value. What would determine the price paid by a willing purchaser? Obviously, a sum approximating the cost of acquiring a parallel right of way of equal value and extent, which, using the same figures, employed in the previous illustrations, would be $10,000,000. Would a purchaser, under normal conditions have the slightest expectation of acquiring plaintiff's right of way for $5,000,000, upon the theory that that sum would represent the fair value of the property computed on the basis of the average market value of adjoining land, leaving out of account the cost of condemnation and damages?

The *Minnesota Rate Cases,* by which the Commission seeks to justify its position, and which will

be discussed at length in Appendix B have been erroneously interpreted. Their dominant note is market value. Present cost of condemnation or of purchase should be based on market value, applying the well understood rules applicable to the exercise of the right of eminent domain. The lands to which we have above referred as having been condemned by the plaintiff at a cost of $180,000, should be accordingly valued at that sum, and they would be so valued under a proper interpretation of those cases. The entire lands and rights of way of the plaintiff should be valued at what it would fairly cost in the market to reacquire them, which for the reasons shown should not be less than $10,000,000, instead of $5,000,000, at which the Commission proposes to value them after encroaching upon the powers of Congress by repealing or expunging an essential part of the statute that defines and controls the powers of the Commission.

In concluding what we have to say of this aspect of the case we again quote from the Director of Valuation, who at page 50 of his Memorandum above referred to, this aptly and forcefully demonstrates the justice of our contention:

> "But will acreage value coincide with present value in all cases? Suppose railroad A was constructed in 1912 and valued as of June 30, 1914. That railroad paid for its right of way lands $1,000,000. The acreage value of those lands as fixed by our appraisers is $500,000. This is no fanciful illustration. Cases as strong are now under investigation by the division. Can this acreage value be treated as that present value for which the statute calls? Is it the present value of the court in the

Minnesota Rate Case, that value upon which the railroad is entitled to earn? I find it difficult to believe that it can be. Unless the value of lands has declined between the date of purchase and that of valuation or the carrier paid an extravagant price in the acquisition of its lands or some other equitable reason to the contrary exists, the court will hardly require that road to accept a return upon less than actual cost."

V.

There are no practical difficulties in the way of ascertaining the present cost of condemnation and damages or of purchase of plaintiff's lands.

The Director of the Bureau of Valuation is the officer charged by the Commission with the compilation of the various schedules called for by the Valuation Act, including the land schedule. He is undoubtedly more familiar with the problem than anyone else, having devoted several years to its consideration. It is most significant that he has not the slightest doubt that the cost of reproduction of lands can be determined with reasonable accuracy, *even where the average market value of the lands has not been agreed upon.* In fact, in his judgment there are two methods, by either of which it may be done. One is to treat each tract or parcel of land as a separate problem and ascertain the cost of its acquisition, as would be done in a condemnation proceeding. The other is to determine a percentage or multiplier to be applied to the

market value of adjoining lands, in order to determine the cost of acquisition of the right of way.

If the Commission decides that the cost of reproduction of lands is to be ascertained and reported, he as Director of the Bureau of Valuation is ready to proceed to do so. This is his statement to the Commission when the plaintiff's case, together with four others, were heard before the Commission at Washington on March 24-28, 1917. At pages 230, 231 of the record of that hearing the views of the Director are plainly set forth. They fully confirm what we have said, as appears from the following excerpts:

> "Director Prouty: I understand, Mr. Chairman, that Mr. Butler is trying to prove that knowing the acreage value of the lands taken by a railroad company, it is possible to apply a percentage to that acreage value which will reasonably express the costs of acquiring that land by the railroad company. I understand that is his proposition.
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> * * * * * * *
>
> Director Prouty: Now, if the Commission please, I concede that. I concede that it is possible, from the experience of carriers in the past, to determine, not accurately, but within certain limits, a multiple or percentage, or whatever you may call it, which you can apply to the base value of these lands in ascertaining the cost of those lands to the railroad company, and we do not need to introduce any more testimony to prove that. I have never denied it.
>
> They also undertook to say that—

Commissioner Clark: Well, Mr. Prouty, do you want to ascertain the cost to the railroad company or in ascertaining, the reasonable proper value of it?

Director Prouty: I mean in ascertaining what it would cost the railroad company to acquire it.

Commissioner Clark: In advance of acquisition?

Director Prouty: *Yes; you may say in advance of acquisition, or after acquisition, or at any other time.* Of course, the estimated cost of acquisition would not be the exact cost that the railroad company might pay, because the amount which a railroad company might pay depends greatly on the personal equation. It makes a difference to a land owner as to what kind of real estate men you have; it makes a difference to the land owner as to how you go at it, whether you undertake to condemn it and get everybody mad, or whether you buy it. A great many things enter into that question; but I mean to say, on the average, you can determine a percentage which expresses the difference between the value of this land by the acre, estimated as we are estimating it now, and what it would cost the railroad company to acquire that land. Now, whether the cost of acquiring the land by the railroad company is the value of it or not is something I do not know anything about, but that is what it costs to get it, that is what it had to pay for it. I concede that that sort of a multiplier or percentage ratio can be determined. It has been determined time after time, it has been

applied time after time. While it is not very accurate, it undoubtedly can be done, within certain limits.

Now, that is the first thing that Mr. Butler proposed to do; and I do not deny that it can be done. I do not admit that that his figures are accurate.

Mr. Butler: Oh, no, no.

Director Prouty: If it is going to be done, we want a chance on our part to take these figures and analyze them. We want to go to work on it in our own way. If you say the thing should be done, we shall undertake to do it.

Now, Mr. Butler says, in the second place, they are going to do another thing, *that they are going to take each parcel of land which has been acquired, and they are going to assume that it has to be re-acquired, and they are going to put a man on to testify what the railroad company would have to pay for each piece of land; I mean for the damages to that land.*

Now, Mr. Farrell says that the Supreme Court has decided that that cannot be done. I have never seen any two people who agreed about the *Minnesota Rate Case,* and I am not speaking as a lawyer in this case, at all, but as a matter of fact, personally, *I have got to concede that that can be done, too, because if the railroad company were condemning that piece of land, and you had gotten into court before a jury, you would have to produce a witness and ask him exactly that question.*

Now, a question that can be asked of a witness and that the witness would be allowed to answer, and would be compelled to answer, certainly is a thing which is susceptible of proof.

So I am not going to stand here and say that that cannot be done. It would be a most unreasonable thing to undertake to do it. It would cost more than the valuation of the lands of the railroads of this county, but, then, I am not going to say that it cannot be done. *I concede that it can be done, and it seems to me that upon those concessions, we might well stop the introduction of this kind of testimony and proceed with the real question, which is whether, upon this statute, it shall be done.*

That, I think, is the question which you gentlemen have to decide, and which you ought to decide before we proceed further with the taking of this testimony."

The Director of Valuation says in his Memorandum above referred to (page 53):

"I have never contended myself that it was impossible to report this fact. This is the issue in every condemnation case. Upon that issue witnesses are called and a conclusion is finally reached. *It can hardly be said that the Commission could not investigate and report its conclusion.*

Nor has the Supreme Court decided that this fact cannot be shown, but rather that the fact when it is shown has no probative value. My thought has been that the commission was not

justified in throwing away millions of money to establish a fact which the Supreme Court of the United States has held since the passage of the act to be of no account when ascertained."

The Director's recommendation, however, is that if the Commission is of the opinion that the cost of reproducing the land should be compiled, then it can best be done by means of a multiplier, with respect to which he says (page 53):

"If the commission is of the opinion that the act does require it to report this fact, and that this requirement of the act should be complied with before calling to the attention of Congress the decision of the Supreme Court, this can probably be done by another method, which will produce a more accurate result and will not involve much effort or expense.

It is generally understood that a railroad must pay for its right of way something more than the acreage value of the land which it takes. It has been the general impression that the value of the right of way of a railroad was determined by the cost of acquiring that right of way at the time in question under the then land values. Therefore in order to determine the value of its right of way, it has been necessary to first determine this excess which the railroad must pay over and above the acreage value.

For this purpose, studies have been made by State commissions and others. The actual expenditure by a railroad for its right of way

in a particular case is known. The acreage value of the land acquired can be determined with substantial accuracy in just the way that our people are determining that fact to-day. The difference between the amount actually paid by the railroad and this acreage value represents the excess cost.

The result of these studies has usually been stated in the form of a percentage or multiple; that is, the excess cost would be as much as the acreage cost, or it might be one-half as much or twice as much. In any event it was stated in terms of a percentage of the land cost and was ordinarily known as a multiple.

The result thus obtained was not exact. As applied to individual parcels it would indicate almost nothing. As an average applying to an entire railroad or to the railroads in an entire section it was fairly accurate. There would be one multiple for the city and another for the country. The multiple might vary between different sections of the country; it might perhaps vary between different railroads according to the conditions under which the railroad was constructed. Taken on the whole, it would be fairly reliable."

The Commission itself, apparently believes that the cost of the reproduction of the land can be ascertained and reported, if its importance justified the expense, for it says in the *Texas Midland case* at page 169, of its report:

"If the Commission is to report this fact and if its report is to be of any value when

made, it must ascertain the fact by a detailed analysis of the damages in case of each parcel. The present force of the Commission is not qualified without further instruction, to do that work in a satisfactory way. Estimates have been made of the additional cost, but they are not reliable. It can only be said that the expense of our land work would be very largely increased.

It should be noted among other things that these values are to be reported as of the present time: The location and extent of the parcels must be considered, therefore, not as they existed when the railroad was built, but as they exsist today. In case of older roads there have been very important changes in the size and frequently in the use of these parcels, so that the first requisite would be a resurvey of the road and an accurate determination of the parcels to be condemned. This of itself would involve a large outlay on the part of either the railroad or the government."

Again, the Commission at page 170 apparently concedes that a percentage or multiplier could be arrived at, which would represent the relation between the market value of land and its cost of acquisition by purchase or condemnation, for it says:

"It cannot be denied that frequently the cost to a railroad of acquiring its right of way with respect to parcels which must be purchased materially exceeds the acreage value of the land taken. Previously to the decision of the Supreme Court in the *Minnesota Rate*

Cases it seems to have been understood by many Commissions and valuators that the proper method of determining the present value of the operative land of a carrier was to inquire what it would cost to acquire those lands upon the basis of present prices. For the purpose of determining the excess of such cost over acreage value many studies were made of pieces of construction where the known cost could be compared with the acreage value, and from these investigations were deduced percentages which varied for rural right of way from 150 to 300 per cent. being less in case of city lands.

It would be possible for the Commission to investigate along these same lines and to report something in the nature of an average percentage, but such a figure would be of little or no significance as applied to individual railroads, and would be tantamount only to a general statement that there is such additional element of cost which usually falls within certain limits. The Commission has not felt that this would satisfy the requirement of the statute, and has believed, as already stated, that it was practically impossible to report the fact called for."

Apparently the Commission had in mind the ascertaining of an average percentage for the *entire country,* applicable alike to all railroads. It is true that *such* a percentage might be of little value when applied to the several railroads, independently. But this entirely overlooks our contention that the percentage should be computed for each individual line, based upon statistics applicable to it, which

are readily available. Each individual line should be treated as a separate problem, or perhaps it might be subdivided into divisions, depending upon the special conditions that may exist. Rural lands should be treated separately from urban lands. The cost of acquiring lands through the pine forests or cut-over lands of Louisiana varies from that incident to the acquisition of right of way through agricultural lands in Missouri and Kansas. The latter in turn is entirely different from the cost of acquiring lands in the uncultivated portion of the Ozark Mountains. A study of each line must of course be made, with a view to ascertaining a fair percentage or multiplier applicable to it. This is what was contemplated in the stipulation made between the relator and the Bureau of Valuation quoted in the Petition (Rec, page 32), which provided for the ascertainment of the cost of reproducing lands by either of the two methods, plaintiff is willing to comply with the terms of the stipulation.

VI.

That certain of plaintiff's lands were acquired by donation presents no difficulty in the way of ascertaining their present cost of condemnation and damages or of purchase.

The Commission, in its Answer points out another supposed difficulty in the way of ascertaining and reporting the reproduction cost of land.

> "It is because there can be no certainty as to what land would have to be acquired at a cost

to the carriers upon reproduction to present acquisition."

It points out the fact that certain lands of the Texas Midland Railroad Company were acquired by donation, and suggests that it would be impossible to say upon a theoretical reacquisition or reproduction what proportion of plaintiff's lands would be respectively acquired by donation, or by purchase or condemnation.

It might be said in passing, that the same difficulty would inhere in the ascertainment of the "cost of reproduction new" of the constituent parts of a railroad other than the land. It frequently happens that the grading of part of the road-bed is the subject of a donation, where, for illustration, third parties grade for a spur or side track or for a station site. Ties are sometimes donated. Frequently money is given to a railway company, and is used in the construction of machine shops, depot buildings and other structures. The Commission has properly ignored such sporadic occurrences and has computed its cost of reproduction schedule upon the theory that all materials are to be acquired by purchase and that all labor be paid for in cash.

No reason is perceived why the same rule should not apply to lands. The statute expressly so requires. It calls for "the present cost of condemnation and damages or of purchase," *not* of lands, originally purchased or condemned by the Railway Company, but "of *all* lands, rights of way and terminals owned or used for the purposes of a common carrier." But two questions are presented; 1, what lands, rights of way and terminals did the plaintiff own or use for the purposes of common

carrier; and, 2, what is the present cost of condemnation and damages or of purchase of those lands? The provision is not ambiguous. There is no room for speculation or conjecture as to what lands are involved, because the requirement of the statute operates upon *all lands*, whether originally acquired by purchase or condemnation, or by gift or by operation of the statute of limitations or in any other conceivable manner. By the subdivision entitled "Fifth" of §19a of the Valuation Act, the amount and value of all donated lands is to be reported separately.

There is another reason, why the reproduction cost of lands should include all lands of every kind, character and description and however acquired, whether by donation or otherwise. The purpose of the reproduction schedule is to furnish a piece of evidence to be used by the Commission in its determination of final value of all the property of the carrier. It is now settled that the carrier is entitled to have included in the final valuation of its property the value of donated lands, or donated property of any kind to which it holds title. If the reproduction schedule of lands omitted the reproduction cost of donated lands, or lands which the Commission might say, would be donated in the event of a reacquisition of the right of way lands, in the process of reproduction, it would be defective, because it would omit elements proper and even necessary to be considered in reaching a judgment of final value.

VII.

The rulings in the Minnesota Rate Cases and related cases, do not relieve the commission of its plain duty under the valuation act to ascertain and report the cost of condemnation or of purchase of the plaintiff's lands.

An analysis of the *Minnesota Rate Cases*, 230 U. S., 352, and of the *Denver Water Works*, 246 U. S., 178, in so far as they bear upon the present is appended to this brief as Exhibit "B." They may be summarized as deciding:

(a) Market value, as distinguished from the artificial conception of "railway value", must be the basis of land reproduction calculations. In other words, in determining the reproduction cost of a railway right of way, the market value of adjoining land is the basis or starting point, to be followed by the aplication of the well understood rules regulating condemnation of private property for public use.

(b) It is illogical to assume the non-existence of a railroad, and at the same time to act on the theory that the values of the adjacent lands, which the presence of the railroad has helped to create, remain unchanged. To do so is to proceed upon an "impossible hypothesis."

The Commission professing to follow the *Minnesota Rate Cases*, now contends that to ascertain the reproduction cost of plaintiff's lands involves the assumption that its railroad would first be removed before the estimate can be made, and that, when removed, an unknown and unascertainable shrinkage in the value of adjacent lands would take place,

and hence no rational estimate of reproduction cost can be made.

There are several conclusive answers to this contention:

1. When the Commission assumes the railroad to be non-existent, and argues that the market value of adjacent lands cannot be ascertained by any known process, and that without such market value as a basis or starting point, it is impossible to determine reproduction cost, it overlooks the fact that it has already determined the average acreage market value of adjoining lands, in the present valuation proceeding, and that the plaintiff has accepted this finding. Consequently there is a starting point, leading to an easy and simple process for the ascertainment of reproduction cost. The Commission has, therefore demonstrated the fallacy of its own argument. If the rule announced in the *Minnesota Rate Cases* presents any obstacle to the determination of the reproduction cost of land (which we deny) the Commission itself has overcome it by finding the market value of adjoining lands.

2. Unquestionably, the Commission has proceeded properly, as required by the Valuation Act, in the determination of the market value of these lands. It has rightly taken these values as it found them on the valuation date. It has not assumed that these values would shrink or be otherwise affected by the hypothetical removal or annihilation of the railroad. That is precisely what Congress intended. The railroads, in being and in operation, were to be valued for the purposes of future rate

making and for all other purposes of governmental control. If through their existence and activities the carriers' lands have increased in value, they were to be entitled to such increase. If their physical properties were worth more than when originally acquired, that increment of value was to be included. If by wise and prudent management a large volume of traffic has been fostered and developed, that element of value was also to be considered. It certainly was not to be disregarded upon the assumption that there was no railroad in existence over which it might move. Nor were the physical properties of the carrier to be estimated at their "junk value" because not appurtenant to railways existing and in operation. The value of the lands of which they were composed was not to be diminished because of a suppositious cessation of the railroad, which helped to create their value.

3. We further deny that it is necessary to assume the non-existence of a railroad in order to determine the reproduction cost of its lands. It was wholly unnecessary to make this assumption in the *Minnesota Rate Cases*. Just why it was made, is not apparent, but evidently that theory was advanced by the carriers and consequently the Court dealt with it as presented.

The problem is after all an exceedingly simple one. A railroad having a right of way one hundred feet wide, eight hundred miles long and extending from Kansas City to the Gulf of Mexico is to be valued. Its operation upon this right of way has contributed to the building of cities, the development of agricultural and mineral lands, and the

location of valuable industries. What is this right of way worth on the valuation date, and how is its value to be determined? One essential piece of evidence is its reproduction cost or what it would cost to purchase or condemn it. There is no justification for asserting that before reproduction cost can be ascertained it is necessary to assume the non-existence of the railroad, and the annihilation of the adjacent cities, industrial, agricultural and mineral development. As well might one assume the non-discovery of America or the non-existence of the State. It is the railroad right of way, in its relation to the railroad and taking into account the actual urban, industrial and agricultural development, that is to be valued. To disregard them would be as unsound as it would be in valuing oil lands to assume the non-existence of their oil bearing strata, or to value coal lands on the assumption that the underlying coal is non-existent. If by final judicial decree or otherwise, all of the right of way deeds or condemnation decrees held by the plaintiff were suddenly declared to be null and void, immediate proceedings would be necessary to re-acquire its right of way by purchase or by condemnation. Would anyone for a moment suppose that this would require the assumption of the removal of the railroad or of its non-existence? Nothing of the kind would be dreamed of. The practical way to meet the situation would be for the plaintiff to send out its right of way men to acquire the tracts of land covered by the invalid deeds or condemnation proceedings, and purchases would be made wherever reasonable terms could be obtained, and where purchases were impracticable, the legal department would be called upon to in-

stitute and prosecute condemnation proceedings. Thus the title would be re-acquired. What the plaintiff itself would do as a practical matter in such circumstances, the Commission can and should do under the requirements of the Valuation Act. The plaintiff's right of way agents and its condemning attorneys would never think of assuming the non-existence of the railroad, nor should the Commission. Any such unnecessary and unwarranted assumption only serves to create difficulties and complications where none exist.

4. A complete answer to the Commission's contention is that Congress, for its own purposes, has determined, in the enactment of the Valuation Act, that the reproduction cost of land shall be ascertained for the two-fold purpose of securing evidence bearing up the final value of the railway properties, and of providing Congress with essential information for its use and guidance in future legislative dealing with railway properties. Congress has commanded the Commission to do the precise thing that the Commission has thus far refused to do. Its excuse for non-performance is that the task is an impossible one and it falls back on the *Minnesota Rate Cases* for its support. But this Court did not say in those cases, even under the construction placed upon them by the Commission, that this *statutory* command could not be complied with. No such statutory command had there been given, and therefore could not be, as it was not, considered. The Court did not decide that the reproduction cost of a carrier's land compiled in response to a statutory requirement was not proper and competent evidence of its value.

If the valuation statute had said in substance: "Assume that all right of way, deeds and condemnation proceedings by which the carrier acquired its title or easement became null and void at the beginning of the theoretical reconstruction period, and ascertain what it would cost by purchase or condemnation to re-acquire the right of way", would the Commission be permitted to say, in this Court, that the task was impossible of performance? Certainly not. Yet the Valuation Act is sufficiently broad and comprehensive to include this as *one* of the methods to be adopted by the Commission.

VIII.

It is respectfully submitted that the judgments of the Supreme Court and of the Court of Appeals of the District of Columbia be reversed and the cause remanded with instructions to issue a peremptory writ of mandamus as prayed for in the amended petition of the plaintiff in error.

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Appendix A.

An Act to amend an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts Amendatory thereof by providing for a valuation of the several classes of property of carriers subject thereto and securing information concerning their stocks, bonds, and other securities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, be further amended by adding thereto a new section, to be known as section nineteen a, and to read as follows:

"Sec. 19a: That the commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classifi-

cation of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

"FIRST. In such investigation said commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

"SECOND: Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

"THIRD: Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of

the same, together with an analysis of the methods of valuation employed.

"FOURTH.—In ascertaining the original cost to date of the property of such common carrier the commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the commission upon the expenditure of all moneys and the purposes for which the same were expended.

"FIFTH.—The commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any state, county, or municpial government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants, of land to any such common carrier, or any previous corporation operating such prop-

erty, by the Government of the United States or by any state, county, or municipal government, and the amount of money deprived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any state, county, or municipal government in consideration of such aid, gift, grant, or donation.

"Except as herein otherwise provided, the commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

"Such investigation shall be commenced within sixty days after the approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

"Every common carrier subject to the provisions of this Act shall furnish to the commission or its agents from time to time and as the commission may require maps, profiles, con-

tracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to corporate with and aid the commission in the work of the valuation of its property in such further particulars and to such extent as the commission may require and direct, and all rules and regulations made by the commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. Unless otherwise ordered by the Commission with the reasons therefor, the records and data of the commission shall be open to the inspection and examination of the public.

"Upon the completion of the valuation herein provided for the commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property, of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Col-

umbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

"To enable the commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the provisions of this Act shall make such reports and furnish such information as the commission may require.

"Whenever the commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall became final, the commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the commission. If no protest is filed within thirty days, said valuation shall became final as of the date thereof.

"If notice of protest is filed the commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any protest of such tentative valuation under the provisions of this Act the commission shall be of the opinion that its valuation should not become final, it shall make such changes as may

be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February Fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

"If upon the trial of any action involving a final value fixed by the commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the com-

mission shall alter, modify or amend its order, such altered, modified, or amended order shall take the place of the original order com plained of and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

"The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forefeitures provided for in section sixteen of the Act to regulate commerce.

"That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section."

Approved March 1, 1913.

APPENDIX B.

An analysis of the Minnesota Rate Cases and related cases insofar as they may be claimed to affect the issues in the present case.

Our present purpose is to analyze the *Minnesota Rate Cases*, 235 U. S., 352, and related cases, for the purpose of demonstrating the unsoundness of the contentions made by the Commission, in justification of its failure to ascertain and report the cost of condemnation or of purchase of the plaintiff's lands. They are:

1. That the ascertainment of the cost of condemnation or of purchase of the plaintiff's lands involves the making of inadmissible assumptions and the employment of impossible hypotheses, which render compliance with the command of the statute, impossible.

2. That the cost data, if assembled, would serve no useful purpose, because the ultimate question to be determined by the Commission is the value of the plaintiff's lands and rights of way, and that such value cannot be greater than the market value of adjoining lands.

We earnestly insist that these contentions of the Commission are essentially and fundamentally unsound, and that its position in this case is wholly unjustified. It will be the purpose of this discussion to demonstrate that this is so.

Preliminary to any consideration of the issues considered and determined in the Minnesota Rate Cases and their application to the instant case, it is highly important that certain considerations be constantly borne in mind.

(a) *The Valuation Act contemplates and requires estimates to be made and assumptions to be indulged.*

In the nature of things, the cost of condemnation or of purchase of lands, must be estimated. It is a theoretical or hypothetical process that is to be applied. No actual condemnation proceedings or actual sales are contemplated. Congress intended this to be an estimate. It is impossible to conceive that it could have intended anything else.

The command of the Valuation Act therefore, is that the Commission shall make an estimate of the cost of condemnation or of purchase, with as much accuracy as the nature of the subject matter will permit. This necessarily requires the making of certain assumptions of fact which are contrary to existing facts. It must be assumed, among other things, that the plaintiff parts with its title to its lands, and that it proceeds by condemnation or purchase to re-acquire them. Constructive trials of condemnation cases must be had in which the Commission, performing the function of a jury, must determine the market value of the various tracts of land taken (unless that has been agreed upon as in the present case) and the damage to the residue when less than an entire tract is condemned. Constructive purchases must likewise be made and here also the function of the Commission is to determine the market value of the various tracts of land taken (when not agreed upon) and the damage to the residue where only a part is purchased. Constructive trials and constructive purchases depend upon assumptions and result in estimates. The intent and spirit of the Act is that the Commission shall indulge in all assumptions that may

be reasonably necessary in order to make the estimates which the Act requires to be made.

The plain purpose of Congress in requiring the Commission to assemble the present cost of condemnation or of purchase of the lands and rights of way of each carrier, was to provide *a piece of evidence* material and relevant to the issue of final value of the carriers' property. The purpose thus to be subserved furnishes a guide for the interpretation of this provision of the Act. In the judgment of Congress such an estimate was competent, material, and relevant evidence to be considered by the Commission in its determination of final value. The weight of this evidence is for the Commission itself to decide.

The action of the Commission, in refusing to make an estimate of the cost of condemnation or of purchase of the plaintiff's lands and rights of way, is in defiance of the express provision of the Act itself and is in conflict with the entire spirit and intent of the Act, as well as with the judgment of Congress which passed it. The considerations which have been influential in inducing the Commission to assume this attitude should be of transcendent and compelling importance, to warrant the extraordinary consequence of nullifying an Act of Congress.

To obey, or not to obey the express command of the Valuation Act to compile schedules, and to determine therefrom the ultimate fact of value, was the question before the Commission, but that was not, by any means, the question before the Court in the *Minnesota Rate Cases*. The Court did not have before it for consideration, an estimate of the cost of condemnation or of purchase of the lands and rights of way of the carrier, *made by an admini-*

strative body under an Act of Congress. It could not, therefore, have expressed any opinion concerning the right and duty of the Commission to proceed in the manner indicated, nor concerning the probative force of the data compiled as the Act requires.

The Court did have before it a schedule of cost of re-acquisition of lands and rights of way which is now conceded by all to have been excessive in amount and to have been compiled upon untenable theories. This schedule the Court justly condemned, but in doing so it did not hold nor did it intimate that the present cost of condemnation or of purchase of the lands or right of way of the carrier could not be ascertained, or that when ascertained it could not be used as a piece of evidence in the determination of the final value of the carrier's property.

(*b*) *Matters which were not before the Supreme Court for decision and which, therefore, were not decided.*

What was *not* decided in the *Minnesota Rate Cases* surpasses in importance, for the purpose of this discussion, the matters which were in fact considered and passed upon in those cases. It is highly significant that the two issues with which we are concerned here, first, the possibility of determining present cost of condemnation or of purchase, secondly, its probative effect when ascertained, were not before this court, were not considered by it, and were not decided.

By the unanimous judgment of courts and text writers alike, the cost of condemnation or of purchase of railroad right of way involves two ques-

tions: (a) the market value of the land taken, and (b) damage to the residue of a tract where less than an entire tract is taken. We have no hesitation in saying that there was no evidence before the court in the *Minnesota Rate Cases* of either the market value of the land taken, whose valuation was there discussed, or of the damage to the untaken residue.

"What is termed the normal value", that is, the market value, said the court, "does not satisfactorily appear" (Opinion page 450). There was no evidence in the record "of the normal value of the land in sales between private parties." The fundamental basis, therefore, of every intelligent and rational estimate of cost of condemnation or of purchase, was wholly lacking.

Not only was there entire absence of any evidence of the market value of the land, but there was a total failure to introduce any testimony showing the cost of condemnation of the lands in question. That this is so, appears from the following significant statement of the Court:

> "There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained" (Opinion page 482).

There being neither market value nor condemnation value before the Court, these absolutely fundamental and essential elements of the problem before us were not, and could not have been considered by the Court, nor could their probative or evidential value have been weighed, determined, or passed upon by the Court. The Court did not say that the present cost of condemnation or of purchase was

or was not a proper measure of the value of the carrier's lands and rights of way, because that issue was not before it, nor was there any evidence to support such an issue if it had been in the case.

(c) *The issue in the Minnesota Rate Cases was between "railway value" and "market value" as the basis of computation, and the court decided in favor of market value.*

The carriers in the *Minnesota Rate Cases* contended that in determining the value of their lands and rights of way, an artificially constructed "rail way value" should be recognized as the basis of computation. This railway value was confessedly in excess of market value and bore no direct relation to it. This Court decided that the so-called railway value is a fiction which the law does not recognize; that market value always has been, and must continue to be the true and only basis of computation which the law provides, and with which the carriers must be content. Running through the entire opinion on the subject of land values, it is repeated in varying forms of expression, that market value must control, and that "railway value" cannot be recognized. In truth the controversy in the *Minnesota Rate Cases* may properly be formulated as "Market Value vs. Railway value."

Read in the light of this controlling feature the opinion is a harmonious and consistent exposition of the reasons why market value, as contrasted with railway value, arbitrarily and artificially fixed should prevail. The specific rules for determining the cost of condemnation based upon the market value, by adding to the value of the land taken the damage to the remainder where only a part was

taken, were not considered or passed upon, nor was there any reason why the court should do so, since the legal rules and principles applicable thereto are too well established to require any elaboration Nor were those cases governed by any statute such as that out of which the present cause has arisen. Hence the language of the opinion has no bearing on the operation of the explicit mandate of Congress, that is now before the Court.

(*d*) *Statement of the facts disclosed in the Minnesota Rate Cases.*

The Railroad and Warehouse Commission of Minnesota issued two orders and the Legislature of that state enacted two laws prescribing maximum charges for the transportation by railroads of freight and passengers. Stockholders of three several railroad corporations operating within the State brought suits in the United States Circuit Court to restrain the enforcement of these orders and laws and to prevent the adoption or maintenance of the rates established by them by the railroad companies. The complainants assailed the acts and orders upon the grounds (a) that they amounted to an unconstitutional interference with interstate commerce, (b) that they were confiscatory, and (c) that the penalties imposed for their violation were so severe as to result in a denial of the equal protection of the laws and a deprivation of property without due process of law. The Circuit Court referred the suits to a Special Master, who took the evidence and made an elaborate report sustaining the complainants' contention that the rates involved were confiscatory. His findings were confirmed by the Circuit Court and decrees

were entered accordingly, adjudging the acts and orders (except in the case of one railroad) to be void, and permanently enjoining the enforcement rates, freight and passenger, and their adoption or maintainance by the railroad companies.

To sustain the contention that the orders and decrees were confiscatory, the complainants gave evidence tending to show the value of the railroad properties as a whole and also the value of those portions situate within the State. The Master and the Circuit Court, in determining the value of the railroad properties, adopted as a basis the cost of reproduction new. In the case of the Northern Pacific, one of the three roads involved, the Master found the value of the portion of that system which was in Minnesota, upon the basis of cost of reproduction new, to be $90,204,545. Of this sum the amount for cost of reproduction new of lands for right of way, yards and terminals was set down as $21,024,562.90, exclusive of certain percentages. The details of this amount are as follows:

Terminal properties, St. Paul appraisement of Read, Watson & Taylor, as modified by railroad company	$7,645,100.24
Add 5 per cent for the cost of acquisition and consequential damages	382,255.01
Property acquired after appraisement	328,725.79
Minneapolis, appraisement of Elwood, Barney & Ridgeway, as modified by railroad company...	4,027,616.17
Add 5 per cent for acquisition and consequential damages	201,380.80

Property acquired after appraisement	227,737.26
Duluth, appraisement of Stryker, Mendenhall & Little	3,602,443.43
Add 25 per cent for railway value, cost of acquisition and consequential damages	900,610.85
Total value of terminals	17,315,869.45
Lands outside of terminals	3,708,693.45
Grand Total	$21,024.562.90

In this Court the appellants insisted that no more than $9,498,099.27 should have been allowed. It was contended by them that the valuation made by the Master and the Circuit Court proceeded on a wrong theory; that it was a speculative estimate of cost of reproduction; that it was wholly in excess of the market value of adjacent or similarly situated property; that it did not represent the present value in any true sense, but constituted a speculative conjecture as to the amount which the railroad company would have to pay to acquire its right of way, yards terminals on an assumption itself inadmissible, namely, that while the railroad did not exist, all other conditions, with respect to the agricultural and industrial development of the state, and the location, population, and activities of towns villages, and cities, were as they existed at the time of the valuation. The respondents contended that the valuation was based upon correct principles and that the value assigned to the land was correct.

(e) Complainants' method of arriving at land values.

This Court first proceeded to consider the basis for the finding in the case of the Northern Pacific, with respect to the "lands outside of terminals," that is, the right of way, and station grounds, etc., outside of the three cities of St. Paul, Minneapolis and Duluth. In the Northern Pacific case the evidence of Thomas Cooper, the Land Commissioner of that road, was adopted by the Master and the Circuit Court as such basis allowing however only 75 per cent. of the amount claimed by him. The amount so allowed was determined upon as the "fair reproduction value of the property."

The precise manner in which this principle was applied is shown by Cooper's evidence. What he did was toset down under the heading of "market value" not market value in the proper sense of that term, but what in his judgment it would cost the railroad company to acquire the land at the time of valuation. This included an excess which he estimated the company would have to pay over the market value of contiguous and similar property if it were called upon to undertake such a reproduction of its right of way. It did not, however, embrace an allowance for payments which might have to be made for improvements possibly found upon the property or for the consequential or severance damages which might possibly have to be met, or for the expense of acquisition. This supposed additional outlays he undertook to estimate. For this purpose he arbitrarily multiplied the sum which in his judgment it would cost the railroad company to acquire the naked land, by

a multiplier adopted by him which in the case of agricultural lands was generally three, and the product thus arrived at was the amount set down as the value for railway purposes. The total amount thus reached by Mr. Cooper in the case of lands outside of the three terminals was $4,944,924.60 The Master regarded the multiplier used as too large and allowed 75 per cent. of the amount thus claimed, or $3,708,693.45, as the "fair reproduction value of the property." This sum was about $1,700,000 in excess of Mr. Cooper's estimate of what the railroad company would have to pay for the bare land.

The method of arriving at the value of the terminal lands in St. Paul, Minneapolis and Duluth was somewhat different. In St. Paul and Minneapolis, Cooper estimated what he thought it would cost the company to purchase these lands exclusive of improvements made upon them, severance and consequential damages and expenses incident to acquisition. These amounts were for the property in St. Paul, $7,645,100.24; in Minneapolis, $4,027,616.17. These precise amounts were adopted by the Master in his findings and to them he added 5 per cent. to cover the cost of acquisition and consequential damages, as appears by the detailed statement of allowances for land values above set forth.

With respect to the Duluth property, where the appraisement appears to have rested upon the ordinary values of real estate, the Master set forth as the appraised value $3,602,443.43, to which he added 25 per cent. or $900,610.85, "for railway value, cost of acquisition and consequential damages."

It thus appears that in every case, except the

terminal in Duluth, the basic or primary figure used was the sum which the complainants' witnesses fixed upon after such inquiries and investigations as they thought proper, to be the amount which the railroad company would be compelled to pay for the naked land at the time of reproduction without any allowance for payments which might have to be made for improvements on the property or for the consequential or severance damages or for the expenses of acquisition. It is important to observe that this basic sum is always treated as being higher per unit than the value of contiguous property. *It embraced an additional amount above the value of contiguous or similarly situated property.* The witness in terms testified that he was unable to state what on an average he had added to the true or normal market value per unit of contiguous or similarly situated property, to allow for the additional amount which the railroad company would have to pay upon the hypothesis that is was at the time of the inquiry compelled to purchase the land. The report of the case fails to disclose what would be the value of the railroad lands in any case, except in Duluth, upon the same basis per unit as contiguous or similarly situated lands. It is quite apparent from Copper's testimony that he gave no evidence on that subject. In arriving at the basic amount of what is called "railway value" it is obvious that he did not rely upon actual sales of railroad land by the company as affording a basis of value, because there had been no such sales. It is also clear that the amount paid by the company for the lands was not a factor to which any weight was given. The aggregate amount paid for lands outside of the

three terminals does not appear. The total original cost of the lands in the three cities named, appears to have been $4,527,228.76; the Master allowed as their value $17,315,869.45.

Mr. Cooper, whose standard was adopted by the Master and the Circuit Court presented the theory that the cost of reproduction was made up of several elements:

(1.) The normal or market value of the land for general purposes as determined by the market value of contiguous and similar lands, *plus* an excess over such normal value which the railroad company would pay for the naked land in case of repurchase.

(2.) In addition to the reproduction cost of the naked land thus computed the severance and consequential damages and the improvements on the land taken. These are estimated and the amount is arrived at by multiplying the figures arrived at as shown in sub-division (1) generally by 3. The product was adopted as the total reproduction cost, thus making the supposed cost of the naked land one third and the supposed consequential and severance damages two-thirds of the total whenever the figure 3 was chosen as the multiplier.

The following excerpts form Mr. Cooper's evidence found on page 446 of the report demonstrate the literal exactness of this analysis:

> Q. Therefore your judgment as to the value of the railroad property is always that it is higher than the value of contiguous property?
>
> A. Yes, yes, that is true.

Q. So that in every case what you call the market value is the value of contiguous or similarly situated property with an additional amount which a railroad company is ordinarily compelled to pay?

A. That is right.

Q. You have put into the market value the excess which a railroad pays for land?

A. That is correct.

Q. And then having determined to your satisfaction at what figure or sum you would place the market value of this property to the railroad company, as you have described, you have added another sum for severance damage, cost of improvements unnecessary to the Company, easements in abutting property and general expenses?

A. That is correct.

Q. And you have determined that in agricultural communities this second addition is shown by the use of the multiple 3?

A. I think the multiple 3 is too low and I so testified in this case.

Q. But that is what you used for the purpose of the right of way value of land through the agricultural communities?

A. That is right in this State.

Q. There is nothing in any of your exhibits which will show nor are you now prepared to state, the difference in what might be termed the normal true, ordinary market value of the lands to the ordinary individual and the sum which you have fixed as the market value to the Railroad Company if it were now compelled to purchase?

A. That is correct.

I. A summary of what was actually decided in the Minnesota Rate Cases.

This method of reproducing lands was condemned by this Court. It held that the basis of all computations must be market value; that the usefulness or adaptability of real property for railway purposes or for any other purpose is merged and swallowed up in the market value when that is once ascertained; that courts cannot assume that juries will disregard the law and render unfair verdicts where railway companies are condemning property; that it is not admissible to use an artificial "railway value," in excess of market value, as a basis, and then to apply to it an arbitrary multiplier to cover severance damages and other items in order to ascertain what the cost of reproduction would probably be, and that the law does not recognize a "railway value" as distinguished from "market value." The Court also held that the appraisements "were in substance appraisements of what was considered to be the peculiar value of the railroad right of way," that this was "an impossible hypothesis" and that railroad right of way was not property *sui generis* and so entitled to a special railway value in excess of market value. *The dominating thought of the opinion upon the subject of land values is that the theory of "railway value" in excess of market value is unsound, and that the basis of all computations must be market value.*

II. The Court fully recognizes that the condemnation cost of right of way as ordinarily understood, is a proper element to be considered in determining the value of railway lands.

It is unnecessary to do more than to refer to the universal rule that the measure of damages in a condemnation proceeding is the market value of the land actually taken, and the damage, if any, to the remainder of the tract where less than the whole is taken. If an entire tract of forty acres of land is condemned and the fair market value is $100 per acre, the damages are $4,000. If a right of way 100 feet wide is condemned diagonally across this same forty acre tract, the damages are measured by the area of the tract taken computed at $100 per acre, plus the damage to the residue of the tract. The Court must have had this in mind when it spoke of condemnation proceedings and the method of computing damages therein.

A fatal objection, in the opinion of the Court, to the estimate of cost of reproduction of land based on "railway value," relied upon by the carriers, was the fact that it was *in excess of the condemnation cost*. Their theory was that a railroad company would be compelled to pay a greater amount than would be represented by a verdict in condemnation proceedings based upon market values. This theory the Court condemned because it would not assume that a jury will act in disregard of the law.

Speaking of the carrier's estimate of the cost of reproduction, the Court said (page 450):

> "It is at once apparent that, so far as the estimate rests upon a supposed compulsory

feature of the acquisition, it cannot be sustained. It is said that the company would be compelled to pay more than what is the normal market value of property in transactions between private parties; that it would lack the freedom they enjoy, and, in view of its needs, it would have to give a higher price. It it also said that this price would be in excess of the present market value of contiguous or similarly situated property. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? But, aside from this, *it is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value.* It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities. It would be free to stand upon its legal rights, and it cannot be supposed that they would be disregarded."

In other words, the carriers presented an estimate of the cost of reproduction of lands which was admittedly in excess of condemnation cost as that expression is ordinarily understood. The Court was asked to approve it upon the theory that that would be the actual cost of re-acquiring the right of way on the theory that courts and juries were likely to disregard the law and their duty, and that consequently condemnation costs could not be limited to the basis of market value. The

Court could not do otherwise than to deny this contention.

That this is the true meaning of the language employed by the Court is shown by the paragraph following that just quoted, (page 451):

> "It is urged that, in this view, the company would be bound to pay the "railway value" of the property. But, supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be en titled to receive on its condemnation, *its fair market value* for all its available uses and purposes."

The carriers were insisting upon railway value. The Court decided in favor of market value. When the Court said that "the owner of each parcel would be entitled to receive on its condemnation *its fair market* value for all its available uses and purposes," (the Court's italics) it meant that the condemnation proceeding would be *based* upon fair market value. It cannot be for a moment supposed that the Court intended to say that in the event of the condemnation of a right of way 100 feet wide running diagonally through a farm of 160 acres, the owner would be entitled to receive only the average market value of the strip of land actually condemned, regardless of the element of damage to the residue of the tract. To do so would impute to the Court the intention to overturn the settled law of eminent domain, and to nullify the constitutional provisions of many states regulating the subject.

The Court merely meant that market value, rather than railway value, should be taken as a basis of computation.

Perhaps the Court might have said with greater accuracy that the "fair market value" would be the *basis* on which the cost of condemnation was to be ascertained, or that the owner would be entitled to the fair market value of each parcel actually taken, plus the damage to the residue where less than an entire tract was taken. Undoubtedly, this was the thought in the Court's mind. The reference to condemnation proceedings could mean nothing else.

To suppose otherwise would impute to the Court an intention to modify the universal rule controlling condemnation proceedings and to emasculate the constitutional provisions touching eminent domain.

It is easily understood why the Court employed the language above quoted without drawing a distinction between the condemnation of an entire parcel, and the condemnation of a part only. The contest before the Court being as we have shown between railway value and market value, the carriers claiming that railway value should be taken as a basis and increased by the use of multipliers and other additions to make the cost of reproduction, and the appellants taking the contrary position. The holding of the Court was that railway value was an impossible hypothesis, but that, on the contrary, market value was the sole test and should be the basis. It was, therefore, unnecessary to refer specifically to the two elements which in the aggregate constitute the damages in condemnation proceedings. The Court must have

taken for granted that they were too well known to require comment.

The use of the expression "fair market value" runs through the entire opinion. Its use in other places is in the same sense as in the foregoing quotation. For illustration, at page 455, the Court says that the company would have no ground of complaint if it were allowed a value for its lands "equal to the fair average market value of similar land in the vicinity." There also, the expression "fair average market value" is intended to indicate the basis on which the condemnation cost is to be computed. As thus understood, the entire opinion is in complete harmony with the well recognized rules of law, and does no violence to established principles. If construed otherwise, as the Commission contends it should be, it leads to the grossest injustice and patent absurdities.

There follows immediately a statement in the opinion that if property has a peculiar value or special adaptation for railroad purposes, that would be an element to be considered (citing *Mississippi River Boom Co.* vs. *Paterson*, 98 U. S., 403; *Shoemaker* vs. *United States*, 147 U. S., 282; *U. S.* vs. *Chandler-Dunbar Water Power Co.*, 229 U. S., 53), This leads to the remark: "But still the inquiry would be as to the fair market value of the property; as to what the owner had lost, and not what the taker had gained."

Of course the inquiry must be as to the fair market value of the property, *as distinguished from railway value*, and that means that we look to the fair market value as the basis for the determination of the cost of condemnation. The language of the opinion certainly does not afford authority

for the proposition that a right of way may be carved out of a larger tract upon payment to the owner of the average market value of the area within the right of way, without regard to the damage to the residue. It would manifestly disregard the deliberate pronouncements made by this Court on repeated occasions, as above shown.

It is likewise true that the question is what the owner has lost, and not what the carrier has gained; but what the owner has lost consists of his damage sustained as adjudged whenever the Court has been called upon to interpret constitutional provisions relative to the condemnation of lands for railway purposes, that is the market value of the tract actually taken, and also the damage to the residue of the tract.

The Court then proceeds to state the familiar rules in condemnation proceedings that the owner is not entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of purposes for which it is taken; or of an increase over its fair market value by reason of any added value supposed to result from combination with tracts acquired from others, so as to make it a part of a continuous railroad right of way held in one ownership, and adds the following statement, *which we conceive to be of the highest importance in this case* (page 452);

> "There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained."

The significance of this comment is at once apparent. The carriers had put forward their sched-

ules of "railway value" and the reproduction costs built upon it, which the Court had condemned because in excess of condemnation costs based on market value. It would be natural for the Court, upon reaching this conclusion, to turn to the record to ascertain if it contained evidence of condemnation costs which the Court could use as a basis of land values, in order to enable it to reach a conclusion as to the total value of the railway's property in the State, to which the test of confiscation could be applied. Evidently the Court examined the record for this very purpose. But it discovered that there was no evidence from which the amount properly allowable in condemnation proceedings could be ascertained. There was not even satisfactory evidence of the market value or normal value of adjoining lands.

The estimate of land values offered by the carriers having thus proven unreliable, and there being no evidence of condemnation costs upon which land values could be properly computed, nothing was left to the Court but to reverse and remand the case, which it accordingly did.

III. It follows that it was estimates based solely on hypothetical "Railway Value" that received the condemnation of this Court.

As before stated, "railway value" is something in excess of market value. There is apparently no standard for its determination or measurement. It is an estimate made by a valuer of what, in his judgment, it would cost the railway company to acquire its right of way, without any

other rule for its determination. It bears no fixed relation to market value, but when ascertained, is to be augmented by the use of multipliers to cover severance damages and other items. It rests upon the assumption that a railroad right of way possesses a peculiar value; that it is *sui generis,* and beyond the operation of established rules applicable to condemnation proceedings, as well as to sales between private parties. But the Court held that a railroad right of way is not immune from the application to it of established rules for the determination of its value; that in the eye of the law, a right of way is a parcel of real estate, and its value for the purposes of sale or for purposes of condemnation, is to be tested as such; that it does not constitute a class of super-property requiring special rules and special considerations. Touching the insistence of the carriers in this respect, Mr. Justice Hughes said (page 453):

> "The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the master were in substance appraisals of what was considered to be the peculiar value of the railroad right of way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgments as to what the railroad right of way was worth."

> And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist, and all the difficulties that might be imagined as incident to such a "reproduction" were considered. The railroad right of way was conceived to be a property *sui generis*, "a large body of land in a continuous ownership," representing one of the highest uses" of property, and possessing an exceptional value. The estimates before us, as approved by the master with his increase of 25 per cent. in the case of the Duluth property, must be taken to be estimates of the "railway value" of the land; and whether or not this is conceived of as paid to other owners upon a hypothetical re-acquisition of the property is not controlling when we come to the substantial question to be decided.

The opinion then proceeds to formulate "the substantial question to be decided." It is in substance, whether railway value or market value shall be the basis employed in ascertaining the value of railroad right of way. This is what is said (page 453):

> "That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right of way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. For the purpose of making rates, is its land devoted to the public use to be treat-

> ed (irrespective of improvements) not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping in this increase, all neighboring lands of like character, devoted to other uses? If rates laid by competent authority, state or national, are otherwise just and reasonable, are they to be held to be unconstitutional and void because they do not permit a return upon in increment so calculated?"

In other words these questions amount to the inquiry whether the Court is to accept railway multiples suggested by the witnesses to reach a cost of reproduction, where such basic railway value is not only in excess of the original cost of the right of way, but also in excess of the market value of contiguous and similarly situated property?

Railway value being in excess of market value, the Court very pertinently asks if this excess, which, as above stated, is to be multiplied by three or some other numeral, is thus to be permitted constantly to outstrip all neighboring lands of like character devoted to other uses.

Before answering "the substantial question to be decided," the Court paused for a moment to dispose of the contentions of the carriers that because the railway right of way is employed in the public service, therefore it is entitled to special consideration and special treatment different from that applicable to similar property owned by others. This is accomplished in the following words (page 454):

> "And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by

> the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right."

Having thus dealt with this incidental matter the Court is prepared to decide "the substantial question to be decided," whether the carriers' synthetic product, called railway value, is entitled to approval. The answer is an emphatic negative (page 455):

> "The increase sought for 'railway value' in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which cannot be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper rest or standard in the transactions of the business world. It is an increment which, in the last analysis, must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant."

Thus "railway value" is rejected because it is in excess of market value which must be the cri-

terion in all estimates of condemnation cost, and because there is no standard by which it may be measured or tested, but rests solely on arbitrary opinion that departs from time-honored methods of valuation generally applied. Having finally disposed of railway value as a basis for the determination of the reproduction cost of land, the Court clearly indicates that this basis should be the market value of adjoining land of similar character. It is to be constantly borne in mind that the Court here is giving its judgment adversely to railway value as a basis or computing cost of reproduction, and favorably to market value, as such basis, and that it uses the expression "market" or "normal value" in this sense. Say the Court (page 455):

> "Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, cannot properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right of way, yards, and terminals upon the so-called "railway value" of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for conjecural cost of acquisiion and consequential damages must be

> disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items of "engineering, superintendence, legal expense," "contingencies," and "interest during construction."

Bearing in mind that the Court has now decided that railway value, which is in excess of market value, may not be used as the basis for computing reproduction cost, it proceeds to say that the true basis is the "normal market value of land in the vicinity having a similar character." Otherwise, we enter the realm of mere conjecture; that is, if we adopt some other standard or basis than market value, we are at sea without chart or compass. Therefore, railway value and the estimates based thereon, are disapproved. It is pointed out that the carrier would have no ground of complaint if it were allowed a value for its lands on the basis of the fair average market value of similar lands in the vicinity without additions by the use of arbitrary multipliers or otherwise to cover hypothetical outlays.

IV. The Denver Water Works case does not support the Commission's interpretation of the Minnesota Rate Cases.

The Commission in its decision in the Texas Midland case (page 60), refers to the Denver Water Works case (246 U. S., 178), quotes an excerpt from the report of the Special Master and draws some conclusions from the ruling of the Court, which, we submit, are misleading.

For illustration, it is stated at the top of page 61 that the Water Works Company excepted to the report of the Master, for the reason that in determining the value of complainant's lands nothing had been allowed on account of consequential or severance damage, and the exceptions were stricken by the lower Court, and that this action was affirmed by this Court. The clear inference is sought to be created that this Court denied the right to include anything in land values except the market value of adjoining lands.

This is erroneous. What did happen, as appears from the opinion of the Court, was that the Master "with the practical consent of the parties" adopted the method of appraising lands and water rights "at their present market value." If the Water Company excepted to this action of the Master, its exceptions were not considered either by the lower Court or by this Court, for the reason that the lower Court declined to hear or consider the exceptions of either party, upon the ground that the reference was by consent, and the exceptions of the Water Company in this Court were not considered because they were conditioned upon the defendant's assignments of error being sustained, when, as a matter of fact, they were overruled.

It is thus apparent in the first place that the method of valuing land adopted by the Special Master and quoted by the Commission was practically consented to by the parties, and hence could not in the nature of things be subject to review here. It is furthermore obvious that if the Water Company excepted to the application of this rule, which it probably could not do, because of its virtual consent thereto, that question was not before this Court because the assignments of error of the Water Company were as already stated, condition-

ed upon the assignments of error of the appellant being sustained.

It is not apparent, therefore, that the remark of the Commission in its opinion in the Texas Midland case (page 61), that the Supreme Court "treated as established, the propriety of estimating the utility's property on the basis of present market value as to lands" is misleading and unwarranted?

This Court did say, page 191:

> "What we have said, establishes the property of estimating complainant's property on the *basis* of present market values as to land, and reproduction cost, less depreciation, as to structures. That this method was fairly applied by the Special Master hardly is disputed by appellants, except as they contest the items allowed for "going concern value" and for the water rights acquired by complainant and its predecessors by original appropriation."

What the Court had said was that the method adopted by the Special Master "was with the practical consent of the parties."

Furthermore it referred to "the *basis* of present market values as to land," which means, as we have always contended, that the basis of all calculations is market value.

It is also to be noted that the method adopted by the Master, says the Court, "hardly is disputed by appellants," the appellants being the city and others on that side of the controversy. Upon no theory of the case could they have any objection to the method adopted by the Special Master of valuing the lands. The only party that could object would be the Water Works Company, which was the cross-appellant, whose assignments of error were not passed upon.